



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kiara v Kagwiria & 2 others (Civil Appeal 88 of 2019)
[2024] KECA 1033 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1033 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 88 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
APRIL 26, 2024**

BETWEEN

AGNES TIRINDI KIARA APPELLANT

AND

VIOLET KAGWIRIA 1ST RESPONDENT

PAMELA KAGWIRIA 2ND RESPONDENT

PENINA KATHURE 3RD RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Meru (Mabeya, J.) dated and delivered on 1st February, 2018 in Succession Cause No. 499 of 2015)

JUDGMENT

1. This is a first appeal against the judgment of the High Court of Kenya at Meru (Mabeya, J.), which was delivered on 1st February, 2018, relating to the estate of Julius Kiragu Kiara (deceased).
2. A brief background of the case is that the deceased died on 18th February 2015. At the time of his death he was 50 years and was employed as a police officer. He died intestate. He was unmarried. He was survived by his mother, (the appellant), as well as three sisters and three brothers. On 16th July 2015, the appellant petitioned the High Court for a grant of letters of administration intestate. The grant was issued to the appellant on 14th October, 2015.
3. Before the certificate of confirmation of grant could issue, the respondents filed an application dated 13th June 2016, seeking to have the grant revoked. The respondents contended that they were children of the deceased, and accused the appellant of failing to disclose this material fact to the court in her petition for the grant of letters of administration. The respondents stated that they were not consulted or included when the succession cause was being filed in court. They deponed that they were actively involved in the deceased's burial, and were recognized by the family as daughters of the deceased. They



- annexed a letter from the area chief addressed to the OCPD, Kieni East, the deceased's final work station, which introduced them as daughters of the deceased. They urged the probate court to revoke the grant issued to the appellant and issue a fresh one naming the respondents as the administrators of the estate of the deceased.
4. The application was opposed by the appellant. She filed a replying affidavit dated 28th December 2016. The appellant maintained that the deceased was unmarried and had not sired any children. She deponed that the respondents had never been introduced to her by the deceased as his children, and that they have never visited her home during the deceased's lifetime. She stated that she only became aware of the respondents during the deceased's burial ceremony, and that they were strangers to her prior to that date. She asserted that the respondents forced their way into the burial ceremony and printed their own eulogy with the sole purpose of laying a claim to the deceased's estate. The appellant pointed out that the respondents failed to avail any documentary evidence to prove their alleged filial relationship to the deceased. She urged the Court to dismiss the respondents' application for lack of merit.
 5. In rebuttal, the respondents filed a further affidavit dated 1st February 2017. They deponed that the deceased never married their mothers but raised them as his children. The 1st respondent swore that she visited the deceased's home during his lifetime, and that at some point in time, while in school, she lived with her paternal aunt, one Juster Kaburi, as well as her paternal uncle, one Dedan Kimathi. The respondents urged that the appellant was being manipulated by her children to deny them the right to inherit from the estate of their father. These assertions by the respondents were denied by Dedan Kimathi, the deceased's brother, and Juster Kaburi, the deceased's sister in their respective replying affidavits dated 2nd March 2017, as well in other affidavits sworn by the deceased's family members.
 6. The case for revocation was heard by way of viva voce evidence. After hearing the parties, Mabeya, J., in his judgment delivered on 1st February 2018, determined that the respondents had sufficiently proved that they are children of the deceased, and were therefore entitled to be considered as beneficiaries of his estate. Consequently, the grant issued to the appellant on 14th October 2015 was revoked, and a fresh grant issued to the appellant, the 1st and 2nd respondents, as joint administrators.
 7. The appellant was aggrieved by this decision of the learned Judge. She proffered six grounds of appeal in challenge to the decision. In a nutshell, the appellant faulted the learned Judge for finding that the respondents are children of the deceased in the absence of evidence to this effect, and contrary to the Government records adduced in evidence. She was aggrieved that the learned Judge failed to appreciate that the respondents did not avail any evidence to prove that they were dependants of the deceased, and could therefore not be beneficiaries to his estate. She was of the view that the decision of the learned Judge was bad in law. In the premises, the appellant invited us to set aside the judgment of the High court, and dismiss the objection filed by the respondents, with costs to the appellant.
 8. The appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Njindo, reiterated that the appellants failed to provide any documentary evidence to prove that the deceased was their father, or that they were dependant on the deceased during his lifetime. He explained that the copy of the eulogy produced by the respondents was refuted by the family, and that the burial permit was irregularly obtained upon instructions of one of the respondent's witnesses. He asserted that the chief's letter produced by the respondents was based on the irregular burial permit and could not therefore be relied upon.
 9. The appellant's counsel pointed out that the respondents' identification documents indicated other individuals as their fathers, and that there is no mention of the deceased in the said documents. He pointed out that the respondents did not avail any financial or school records to show that the deceased supported them financially, nor did they avail any evidence to show that they were in communication



with the deceased during his lifetime. It was his submission that the deceased's family members denied any knowledge that the respondents were children of the deceased as alleged. Learned counsel urged us to allow the appeal and set aside the decision of the probate court.

10. The appeal was opposed. It was submitted on behalf of the respondents, that the appellant had been manipulated by her children to deny the fact that the respondents are children of the deceased. Counsel for the respondents explained that the evidence by the appellant's witnesses was inconsistent and contradictory, which was proof of their untruthfulness. Learned counsel submitted that the appellant was not able to explain why the respondents were allowed to participate in the deceased's burial, if they were not children of the deceased. He asserted that the 1st respondent's school records showed that she used the surname 'Kiragu' which is a name of the deceased.
11. With respect to the respondents' identification cards, it was his submission that the respondents sufficiently explained that they used their maternal grandfather's and uncle's names to acquire the same, which is not an uncommon practice. Counsel stated that the respondents made the application for revocation of the grant issued to the appellant as children of the deceased, and not as his dependants. He submitted that the respondents availed independent witnesses who established a nexus between the deceased and the respondents. He reiterated that the respondents were ready and willing to undergo a DNA test, but the probate court found that even in the absence of DNA evidence, the evidence that had been adduced sufficiently established that the respondents were children of the deceased. Learned counsel urged us to dismiss the appeal for lack of merit.
12. This being a first appeal, our duty was well stated in *Selle and Another v. Associated Motor Boat Co. Ltd* [1968] E.A. 123, where the Court observed as follows:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider 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 this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mbamed Sholan*, (1955) E.A.C.A. 270)”.

13. Guided by the foregoing principles, the record of appeal as well as submissions by parties to the appeal, we are called upon to re-evaluate the evidence tendered before the probate court and determine whether the learned Judge erred in allowing the respondent's application dated 13th June 2016, and thereby revoking the grant originally issued to the appellant.
14. Section 76 of the [Law of Succession Act](#) states as follows in regard to circumstances under which a grant may be revoked:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either –
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - a. that the grant has become useless and inoperative through subsequent circumstances.”

15. It was the respondents’ case before the probate court that the grant issued to the appellant was obtained on the basis of material non-disclosure of the fact that the deceased had children, being the respondents, who were born out wedlock. They stated that the 1st respondent’s mother is one Jane Maiti Kiugu, while the mother to the 2nd and 3rd respondents is Esther Kagendo who testified as PW3. PW3 told the Court that she was not married to the deceased, she was in an intimate relationship with the deceased that led to the pregnancies and later births of the 2nd and 3rd respondents. She testified that the respondents had visited the appellant during the deceased’s lifetime, and that the deceased financially supported her by catering for school fees and upkeep of the respondents. PW3 admitted that the 2nd and 3rd respondents’ birth certificates did not bear the name of the deceased as their father. PW4, Joseph Kimathi, is a brother to PW3. He stated that the deceased and the appellant were present when PW3 was admitted at hospital to deliver the 2nd and 3rd respondents.
16. PW5, Bernard Gitari, from Karamugi Girls High School, produced school admission records with respect to the 1st respondent, which showed that she was admitted to the said school as Violet K. Kiragu. He stated that her certificates however reflected the name Kiugu Kagwiria Violet. PW6, Duncan Murithi Murungi, availed the 2nd and 3rd respondents’ school records. It was his evidence that the deceased did not feature anywhere in the records as the father of the respondents, and that their records only contained the details of their mother, PW3. The area Chief, John Kithinji, testified as PW7. He told the Court that although the respondents did not hail from his jurisdiction, he knows them as children of the deceased, and that they used to visit him. He admitted that there was an issue during the burial of the deceased concerning the presence of the respondents at the said burial. PW8, Julius Kimathi Kiara, the assistant area Chief, on his part stated that he knew the deceased very well and that he was unmarried with no known children.
17. The deceased’s former superior, Ancent Kaloki, formerly OCPD Kieni East, testified that the deceased had nominated the appellant as his next of kin, and that he made no mention of having any children in his employment records. He stated that the respondents appeared with their mother at the mortuary on the day of the burial demanding to be included in the funeral programme, and upon making inquiry from the deceased’s family, they admitted to knowing the respondents as children of the deceased. He



- stated that he did not conduct any investigations to ascertain whether the respondents were indeed the children of the deceased and that he did not include their names in the introduction letter to Pioneer Insurance since they did not feature in the deceased's employment records.
18. The appellant and her witnesses, on their part, denied any knowledge that the deceased was married or had sired any children during his lifetime. They maintained that the respondents were strangers to them, and that they only met them for the first time when the respondents were introduced to them by the area Chief during the burial arrangements. They denied preparing the eulogy produced by the respondents, or the assertion that they had at one point hosted the respondents while they attended their respective schools. The appellant availed a witness from the National Registration Bureau (RW7) who produced identification records with respect to the respondents. None of the respondents indicated that the deceased was their father when they applied to be issued with their national identity cards.
 19. On re-evaluating the evidence on record, we note that although the respondents alleged that the deceased took care of them and provided for their upkeep and school fees during their childhood, they failed to avail any evidence, direct or circumstantial, to that effect. There is no documentary, or any evidence of any form, from any of the schools attended to by the respondents that the deceased presented himself as a parent to any of the respondents.
 20. PW5 and PW6 who testified as school faculty from the respondents' respective schools told the Court that there were no records from the respective schools identifying the deceased as the respondents' father or guardian, or indicating that the deceased made any payments towards the education of the respondents. Indeed, the respondents did not avail any evidence to establish that the deceased assumed parental responsibility of them as his children during his lifetime.
 21. It is also rather odd that the respondents contend that they knew the deceased to be their father, and that he took care of them all through their childhood and education, and that they used to visit him and his family during his lifetime, yet when the respondents attained adulthood they failed to acknowledge the deceased was their father when they applied to be issued their national identity cards. If the deceased acknowledged the respondents as his children during his lifetime, why did they not indicate this fact when they applied for their identity cards?
 22. At the time of procuring their identity cards, the respondents were adults and had the choice and liberty to indicate the person they considered to be their father in this crucial document that denotes citizenship. At that age they were not under influence of any person. The 1st and 2nd respondents named other relatives as their father in their identification documents, while the 3rd respondent only named her mother. Further, if the assertion by PW4 that the deceased was present at the hospital when the 2nd and 3rd respondents were born is true, why was the deceased not registered as their father in their birth certificates? The deceased on his part, only named the appellant as his next of kin, in his employment records, according to the evidence of his superior, PW9.
 23. One of the pieces of evidence relied on by the learned Judge to determine in favour of the respondents was the photograph produced by the respondents as p.exhibit 1, which featured the appellant and the 1st respondent, as well as a copy of the eulogy. It is our considered view that the photograph was persuasive at best, as any person can take freely take photographs without intending it to be proof of kinship. Such evidence must be substantiated by other cogent evidence. In addition, the photograph in question was said to have been taken in July 2016, after the deceased's burial, and notably, after the succession cause had been lodged by the appellant in the probate court. The probative value of such evidence was tenuous to say the least.



- 24. We hold that it was peculiar that the respondents gave evidence to the effect that they visited and lived with the deceased's family during their school holidays, and that they were not strangers to the deceased's family, yet the area Chief had to escort them to the deceased's family home when the deceased died in an effort to introduce them as children of the deceased. This evidence was contradictory and bereft of credibility. The area Chief admitted in his evidence before the probate court that there was a disagreement stemming from the fact that the respondents used the burial as a forum to seek recognition as the deceased's children.
- 25. From the record, it is noted that the parties were not averse to a DNA test being conducted. The learned Judge observed that it was not prudent to disturb the dead in the circumstances, by disinterring the deceased's body, so as to obtain DNA samples. We agree with the learned Judge's sentiments to the extent that exhumation of a deceased person's body should be a recourse of last resort. However, it is our considered view that other sources of samples required to establish paternity could have been obtained from the deceased's immediate family in the circumstances, if the Court was minded to establish the paternity of the respondents by DNA. It was the respondents' duty to assert this in their case. They failed to do this and made their case not meet the legal standard of proof on a balance of probabilities.
- 26. From the foregoing, we are not satisfied that the respondents made out a case in support of their claim that they were children of the deceased. It is our finding that the appellant did not conceal any material facts to warrant revocation of the grant that had been issued to her.
- 27. Our re-evaluation of the entire evidence adduced before the trial court leads us to the irresistible conclusion that the appeal must succeed. The judgment of the High Court revoking the grant issued to the appellant on 14th October 2015, is hereby set aside. The respondents' application dated 13th June 2016, is hereby dismissed. The appellant is at liberty to apply for confirmation of the same. Costs of the appeal and the High Court shall be borne by the respondents.
- 28. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

