FWK (Guardian ad litem for TK & SN - Minors) v AMM & another (Civil Appeal E077 of 2023) [2024] KECA 707 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 707 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E077 OF 2023

P NYAMWEYA, LK KIMARU & AO MUCHELULE, JJA

JUNE 21, 2024

BETWEEN

FWK (GUARDIAN AD LITEM FOR TK AND SN - MINORS) ..... APPELLANT

AND

AMM ..... 1ST RESPONDENT

MWM ..... 2ND RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Nyeri (F. Muchemi, J.) dated 20th December 2022 in Succession Cause No. E012 of 2021)

JUDGMENT

1. The deceased IMM alias Ignatius LMM alias Dr. IMM died intestate in Nyeri on 25th March 2021. His widow, MWM (1st respondent), and son, AMM (2nd respondent), petitioned the High Court at Nyeri for the grant of letters of administration intestate. The joint grant was issued to them on 25th October 2021.

2. In summons dated 21st March 2022, the respondents sought to have the grant confirmed before the expiry of six months. They wanted a medical bill of Kshs.614,779/22 in respect of the 1st respondent paid. There was the allegation that the estate owed Kshs.8,967,226/92 which they wanted paid. The appellant, FWK filed an application seeking to be joined in the succession cause. She did this as guardian ad litem of TK and SN, the two children she had conceived with, and who she said the deceased had, during his lifetime, recognized as his own and had provided for. She wanted them joined in the cause as beneficiaries of the estate of the deceased.

3. In the supporting affidavit, the appellant stated that the deceased had financially supported the children between 1st January 2016 and 29th March 2021, and had annexed her bank statements to show monies

she had been receiving from the deceased. She stated that, the deceased had financed the purchase of Land Reference No. Nyeri/Muringato/xxxx/5 on which he had built her a house.

4. The application for joinder was opposed by the 1st respondent through her replying affidavit. The 1st respondent swore that the birth certificates for the two children that the appellant had annexed to her supporting affidavit did not have the deceased's name to show that he was the father of the children. Her case was that the financial documents that the appellant had tendered did not prove dependency, or that the deceased was the father of the children or had recognized them. She questioned why the support to the children begun in 2018 when the first child was shown to have been born in 2009. The 1st respondent deponed that the children had not been recognized in the deceased's eulogy. Lastly, she pointed out that the appellant was the deceased's accountant/personal assistant at his clinic, and had therefore gained access to his phones and back accounts in that capacity.

5. The application for joinder was disposed of by way of written submissions in which the respective counsel had addressed the questions of paternity and dependency.

6. In the ruling that the learned F. Muchemi, J. rendered on 20th December 2022, it was observed that: -

> " 31...Although the applicant has sought to be enjoined as a beneficiary of the estate as guardian ad litem for the minors, in essence the application seeks to determine the issue of dependency or paternity of the minors...."

The learned Judge went on to discuss whether the issues of dependency and paternity had been proved by the appellant and concluded as follows: -

> " 40. It is my considered view that the appellant having failed to establish the grounds relied on in this application as to paternity and dependency, cannot claim a legal basis of being enjoined in this cause to represent the interest of the two minors "

The application was dismissed, each party being asked to pay their own costs.

7. The appellant was aggrieved by the decision, hence this appeal. Her grounds of appeal were as follows:-

> " 1. The learned trial Judge erred in law and in fact in giving conclusive orders on paternity and dependency in an application whereas such orders would only call for an instance whereby the appellant would be expected to go to full trial to present her evidence on paternity and dependence and that of her witnesses and as such, her right to a fair trial was not taken into consideration.
>
> 2. The learned trial Judge erred in law and in fact in not taking into consideration the provisions of section 29 and section 3(2) of the *Law of Succession Act* and on who is entitled to inherit out of a deceased's estate.
>
> 3. The learned trial Judge erred in law and in fact in failing to appreciate that a birth certificate is not a definitive document on paternity.
>
> 4. The learned trial Judge erred in law and in fact in failing to appreciate that the appellant had proven dependency of the minors on the deceased.
>
> 5. The learned trial Judge erred in law and in fact in condemning the appellant without hearing her yet she had indicated that she was willing to avail the minors for DNA testing if the Court required definitive proof of parentage."

She sought that the appeal be allowed and that the ruling be set aside and or reviewed.

8. During the hearing of the appeal, learned counsel Ms. Mwai was present for the appellant and learned counsel Mr. Kariuki represented the respondents. They had each filed written submissions which they asked the Court to base its decision on.

9. The submissions by learned counsel for the appellant was two- pronged. First, it was submitted that this was an application for joinder and therefore it was wrong for the learned Judge to make a determination on the issues of dependency and paternity when the parties had not been invited to tender evidence on the issues; that the learned Judge had prematurely decided the dispute. Secondly, that, on the material before the Court, both dependency and paternity had been overwhelmingly demonstrated.

10. Learned counsel for the respondents attacked the appeal on two fronts. The first was that the appeal was incompetent as no leave to appeal had been sought or obtained in this succession cause. Reliance was placed on the decisions in *Mrewa Kiome -vs- Stephen Marande Kiome*, Civil Application No. 217 of 1995, *Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja* [2014]eKLR, and *George Vuhuga Kidula - vs- James Kidula*, Civil Application No. 148 of 1998

11. The second related to the merits of the appeal. Learned counsel submitted that, first, if the appellant sought dependency or paternity, she was required to come under sections 28 and 29 of the *Law of Succession Act*. Instead, she had approached the Court under Rules 49 and 73 of the *Probate and Administration Rules*. Secondly, that, even after coming through the wrong provisions of the *Act*, she had failed to prove prima facie that the deceased was the father of the children or that he had been maintaining them.

12. As the first appellate Court, we are required to subject the evidence as recorded and the impugned ruling to fresh consideration and evaluation to determine whether the conclusions reached by the learned Judge on the application were tenable on the facts and sound in law. But even before we go there, the respondents raised the issue of jurisdiction; that, this being a succession dispute, the appellant was required to seek the leave of the High Court or the leave of this Court before appealing. Since no such leave was sought or obtained, this Court lacks the jurisdiction to hear and determine the appeal, counsel urged.

13. As was reiterated in In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the *Constitution*, Constitutional Application No. 2 of 2011, this Court or any other court can only entertain a dispute that the *Constitution* or statute allows it to hear and determine. The Court cannot arrogate to itself jurisdiction through craft or interpretation. In *Owners of the Motor Vessel "Lillians" –vs- Caltex Oil (Kenya) Ltd* [1989]KLR 1, Nyarangi, JA. Noted that –

> "Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

14. Indeed, it was submitted on behalf of the respondents that because the appellant did not seek leave to appeal, we lack jurisdiction and therefore should not deal with the merits of the appeal; that the appeal was incompetent on account of jurisdiction.

15. The appellant did not respond to the issue of jurisdiction.

16. In the various of its decisions, including *Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja* (*Supra*); *George Vuhuga Kidula -vs- James Kidula*, (*Supra*); *Mary Odhiambo Otieno -vs- Gertrude Akoth Andunga*, Civil Appeal No. 309 of 1997; and *John Mwita Murimi & 2 Others -vs-*

Mwikabe Chacha Mwita & Another [2019]eKLR, this Court has held that under the *Law of Succession Act*, there is no express automatic right of appeal; that an appeal will lie to this Court from the decision of the High Court, exercising its original jurisdiction with leave of the High Court or, where an application for leave is refused, with leave of this Court.

17. With this line of authorities by this Court, we accept the respondents' position that, since there was no leave sought or granted, the appellant's appeal before us is not competent. We lack the jurisdiction to hear and determine the appeal.

18. For these reasons, the appeal is struck out.

19. Given the facts of the case, we direct that each party shall bear own costs.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE 2024

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR