Njue & another v Kithumbu & another (Civil Appeal 16 of 2020) [2024] KECA 712 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 712 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 16 OF 2020

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

JUNE 21, 2024

BETWEEN

JOSEPHINE RWAMBA NJUE ..... 1ST APPELLANT

JAMES NAMO ..... 2ND APPELLANT

AND

ELIJAH NYAGA KITHUMBU ..... 1ST RESPONDENT

VIOLET NGITHI KITHUMBU ..... 2ND RESPONDENT

(Being an appeal against the ruling and order of the High Court of Kenya at Embu (Muchemi J.) dated 24th July, 2019 in Miscellaneous Application No. 205 of 2015)

JUDGMENT

1. This is a first appeal against the ruling of the High Court of Kenya at Embu (Muchemi, J.), delivered on 24th July 2019, relating to the Estate of Kithumbu Nyaga Elija, (the deceased).

2. A brief background of the case is that the deceased died on 29th April 2011. He died intestate. He was survived by the 1st appellant, who was his wife, and two children: KMK, aged 15 years; and ACK, aged 12 years. In Succession Cause No. 227 of 2011, the appellants petitioned the Principal Magistrate's Court at Runyenjes, for a grant of letters of administration intestate, which was issued to them, and confirmed on 6th March 2012.

3. On 22nd October 2015, the respondents filed an application before the High Court of Kenya at Embu, seeking an order to revoke the grant issued to the appellants. The application was supported by an affidavit sworn by the 2nd respondent on the same date. It was the respondents' contention that the appellants obtained the said grant of letters of administration intestate by fraud, through concealment of material facts.

4. The respondents averred that they are children of the deceased, and accused the appellants of failing to inform the probate court that the deceased had four other children, besides the two that he sired with the 1st appellant. They deponed that the deceased had three wives, including the 1st appellant, who was his third wife. They deponed that the 1st respondent's mother was the deceased's first wife, and that she was blessed with two children with the deceased i.e. the 1st respondent, and her brother Alex Murimi Kithumbu.

5. The 2nd respondent's mother was said to be the deceased's second wife. She too was alleged to have been blessed with two children with the deceased, that is, the 2nd respondent, and his younger brother, Kevin Kithumbu Juma. Kevin, however, is deceased. He left behind two children: Jonathan Nyaga Juma and Margaret Adash Juma. The respondents annexed birth certificates of the named beneficiaries who were left out of the succession proceedings. They asserted that the 2nd appellant was a stranger to the estate of the deceased.

6. It was the respondents' case that upon the demise of the deceased, the family held a meeting at the office of the District Officer, on 11th January 2012, and a further meeting on 22nd January 2012, at the residence of Lewis Munyi, where the family agreed that the estate of the deceased would be administered jointly by the respondents and the 1st appellant. They accused the appellant of going against the wishes of the family, and secretly petitioning the court for a grant of letters of administration intestate, with respect to the estate of the deceased, without informing the other beneficiaries of the deceased.

7. The respondents urged that the Principal Magistrate's Court, which issued the said grant, did not have the requisite pecuniary and geographical jurisdiction to hear and determine the succession cause. They contended that the grant of letters of administration were issued on 5th March 2012, and unprocedurally confirmed a day later, on 6th March 2012. They averred that the deceased, during his lifetime, maintained all his children. They urged the learned Judge to revoke the grant issued to the appellants.

8. The application was opposed. The 1st appellant filed a replying affidavit dated 20th January 2016. She deponed that she was the only widow of the deceased, and that she was issued with his burial permit, and that no other widows showed up at his funeral. She averred that she met the deceased in 1991, after which they got married in 1994. She deponed that prior to his death, she lived with the deceased for seventeen (17) years, and that during the entire time, she was never introduced to any other children of the deceased.

9. The 1st appellant swore that the respondents were not present during the deceased's funeral, despite his death announcement being published in the newspaper and announced on radio.

   That since her children were minors, she was required to enjoin a co-administrator, hence the reason she chose the 2nd appellant, who is an uncle of the deceased, and a close family member. She deponed that the sixteen parcels of land that formed part of the deceased's estate were acquired by the deceased and herself, during the subsistence of their marriage.

10. The 2nd respondent filed a further affidavit dated 20th May 2016, in response to the 1st appellant's replying affidavit. He deponed that the 2nd appellant was not an uncle to the deceased, and that the death announcement published on the newspaper, which was relied on by the 1st appellant, did not list him as being part of the deceased's family. He asserted that the 2nd appellant was employed by one his uncles as a casual labourer.

11. The 2nd respondent averred that the 1st appellant's marriage to the deceased was not in issue, but rather the fact that the deceased had other children, who were excluded and not recognized as beneficiaries of the estate of the deceased in the succession proceedings. He deponed that they were ready and willing to undertake DNA test to prove that the deceased was their father. He reiterated that they attended the deceased's burial, and annexed photographs as well as the eulogy as proof.

    He asserted that although the parcels of land listed as part of the deceased estate were subdivided during the subsistence of the 1st appellant's marriage to the deceased, the deceased inherited the same from the respondent's grandfather.

12. By consent of the parties, the application was disposed of by the court relying on the written submissions filed by the parties. The learned Judge, in a ruling delivered on 24th July 2019, determined that the respondents had sufficiently proved that they were children of the deceased, and were therefore entitled to inherit from his estate. Consequently, the grant issued to the appellants and confirmed on 6th March 2012, was revoked.

13. The learned Judge directed that all assets of the deceased, listed from the said grant, that had been transmitted pursuant to the said confirmed grant, revert back to the name of the deceased.

14. The learned Judge then appointed the 1st appellant, and both respondents, as joint administrators of the estate of the deceased, and directed them to file summons for confirmation of the grant within sixty (60) days of the decision of the court.

15. The appellants were aggrieved by this decision of the learned Judge. They proffered nine grounds of appeal. In a nutshell, the appellants were of the view that the learned Judge erred in law, in finding that the appellants were guilty of non-disclosure of material facts, and that the deceased had other wives and children, against the weight of the evidence on record. They faulted the learned Judge for shifting the burden of procuring a sample of the deceased's DNA to the 1st appellant, asserting that the deceased never acknowledged the respondents as his children during his lifetime, and therefore the burden of proving otherwise fell on them.

16. The appellants were aggrieved that the learned Judge appointed the respondents as joint administrators of the estate of the deceased, and ordered the cancellation of transmissions effected on the properties that comprised the deceased's estate, yet these issues were not specifically pleaded by the respondents. The appellants contended that the learned Judge misapprehended the role of the 2nd appellant, who was appointed as a legal guardian to safeguard the interest of the deceased's children, with respect to the deceased's estate. Lastly, the appellants were aggrieved that despite the 1st respondent not participating in the proceedings before the High court, the learned Judge erred in entertaining her case in finding in her favour.

17. The appeal was canvassed by way of written submissions. Mr. Njage for the appellant, faulted the learned Judge for disposing the application by way of written submissions, as opposed to viva voce evidence. He submitted that oral evidence would have accorded the appellants a chance to cross-examine the respondents, and test the veracity of some of the crucial documentary evidence, such as the birth certificates that were relied on by the respondents to support their case.

18. Learned counsel for the appellants was of the view that the respondents' case was a non-starter, as they had failed to file any objection to the appellants' application for grant of representation, within the requisite thirty days of the publication of the notice in the Kenya Gazette. Counsel submitted that it was not enough for the respondents to state that they were ready and willing undertake a DNA test. The onus fell on them to conclusively prove that they were children of the deceased. He reiterated that

the respondents, in their application, only sought an order for the revocation of the grant, and that the learned Judge was misguided in appointing new administrators, and making an order for cancelation of any transfers made pursuant to the confirmation of grant issued with respect to the estate of the deceased, given that the grant was being challenged after seven (7) years. Counsel invited us to allow the appeal and set aside the decision of the probate court.

19. On their part, it was submitted on behalf of the respondents that the appellants were not properly before this Court as they failed to seek the leave of the High Court before instituting this appeal. Ms. Mukami for the respondents stated that under the *Law of Succession Act*, an appeal lies to the Court of Appeal, from a decision of the High Court exercising its original jurisdiction, with leave of the court.

20. Ms. Mukami insisted that the question of whether the application ought to have been disposed by way of viva voce evidence did not form part of the appellants' grounds of appeal. It was only brought up in their submissions. She added that the directions that the summons be disposed by written submissions was given by consent of the parties, and that the appellants had ample opportunity to challenge these directions before the High Court before the ruling was delivered. She reiterated that affidavit evidence was not inferior to oral evidence, and was legally admissible in law.

21. It was counsel's further submission that the respondents tendered sufficient evidence to establish the fact that the appellants obtained the grant through concealment of material facts. She stated that the birth certificates produced by the respondents evidenced that the deceased was their father, a fact that was not seriously challenged by the appellants. She pointed out that the eulogy of the deceased indicated that he had six children, including the respondents.

22. With respect to the decision made by the court, counsel submitted that the same were made as a consequence of the order of revocation of the grant that had been issued to the appellants. She reiterated that Section 93 of the *Law of Succession Act* did not aid a party who acquired a title fraudulently or illegally. In the premises, counsel urged us to dismiss the appeal for lack of merit.

23. 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 Mhamed Sholan, (1955) E.A.C.A. 270)".

24. Guided by the foregoing principles, the record of appeal as well as submissions made by parties to the appeal, we are called upon to re-evaluate the evidence tendered before the probate court and determine the following issues:

    i. Whether this Court has jurisdiction to entertain the instant appeal;

    ii. whether the learned Judge erred in disposing of the summons by way of written submissions;

    iii. whether the learned Judge erred in revoking the grant dated 6th March 2012, that was originally issued to the appellants; and

iv. whether the final orders issued by the High Court were sound in law.

25. It is the respondent's contention that the appellants failed to seek leave before lodging the instant appeal, and as such, the jurisdiction of this Court has not been properly invoked. Under the *Law of Succession Act*, appellate jurisdiction is governed by Section 50 which stipulates as follows:

> " 50. Appeals to High Court
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> 1. An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.
>
> 2. An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal."

26. From the foregoing, decisions by the Magistrate's and Kadhi's Courts are appealable to the High Court, and that subsequent appeals to this Court are only allowed pursuant to leave of the court. It is notable that Section 47 of the *Law of Succession Act*, which provides for the original jurisdiction of the High Court, is silent on whether appeals lie to this Court, as a matter of right, from a decision of the High Court, as in present an instance.

27. The question of whether a party has an automatic right of appeal to this Court, from a decision of the High Court, exercising its original jurisdiction, under the *Law of Succession Act*, has been addressed by several conflicting decisions of this Court. For instance, in Peter Wahome Kimotho v Josphine Mwiyeria Mwanu [2014] eKLR (Visram, Koome & Maraga, JJ.A.) found that leave to appeal from the High Court to the Court of Appeal in succession matters was not required. On the other hand, in the case of Rhoda Wairimu Karanja & Another v Mary Wangui Karanja & Another [2014] eKLR this Court (Musinga, Ouko & Gatembu, JJ.A.) had this to say:

> " We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."

28. It is our considered view that, having examined the law and the decided cases, we find no provision that confers upon the appellants an automatic right of appeal to this Court. It is trite that a right of appeal must be expressly conferred by the law. The Supreme Court in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR stated as follows:

> " An appeal is granted in specific terms by *the Constitution* or a statute. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A Court of law cannot assume appellate jurisdiction where none has been specifically granted by *the Constitution* or statute."

29. There is no evidence that leave of court to appeal was obtained by the appellants before they lodged this appeal. From the foregoing, we are satisfied that the appellants have no automatic right of appeal to this Court. They ought to have sought leave of court before filing this appeal. The appeal before us is incompetent.

30. We, however, note that due to the conflicting decisions of this Court, the issue as to whether leave to appeal to this Court in respect of a succession dispute determined by the High court in exercise of its original jurisdiction, has not been settled. No doubt the issue will finally be settled by the Supreme Court following this Court's recent certification of the issue for determination by that court.

31. Having said that, even if we were to consider the appeal on merit, the outcome would still be an order of dismissal. We say so because, first and foremost, the question of whether the summons filed before the High Court ought to have been disposed by way of viva voce evidence, did not form part of the appellants' grounds of appeal. It only featured in their submissions, contrary to the provisions of Rule 107 of the Court of Appeal Rules, 2022 which provides that:

> " At the hearing of the appeal-
>
> a. "no party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 95 or rule 96;
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> b. a respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by the application under rule 86;
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> c. the Court shall not allow an appeal or cross-appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal without affording the respondent or any person who, in relation to that ground, should have been made a respondent, or the appellant, as the case may be, an opportunity of being heard on that ground; and
>
> d. the arguments contained in any statement lodged under rule 100 shall receive the same consideration as if they had been advanced orally at the hearing."

32. From the foregoing, we agree with the submission by the respondents, that this Court cannot consider the issue of whether the learned Judge erred in determining the application by written submissions, as these submissions were made on issues that were not before this Court. In any event, it was clear from the record of the probate court that the parties themselves agreed by consent to adopt that procedure for the purpose of disposing of the application for revocation of grant that was before the court.

33. Secondly, it is our finding that the respondents sufficiently made out a case for revocation of the grant issued to the appellants. Section 76 of the *Law of Succession Act* provides thus:

> " 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 –
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> a. that the proceedings to obtain the grant were defective in substance;
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> 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

e. that the grant has become useless and inoperative through subsequent circumstances." (Emphasis ours)

34. It was the appellants' contention that since the respondents failed to lodge a notice of objection to the appellants' prior application for a grant of letters of administration intestate, within the period prior to the grant being confirmed, their application for revocation of the same was, in the circumstances, untenable. As has been clearly stipulated by Section 76 set out above, a grant of representation, whether confirmed or not, is subject to revocation, if any of grounds set out therein are established.

35. In this case, the respondents established that the appellants procured the grant of representation by concealment of material facts, particularly, that the deceased had four other children, other than the 1st appellants' two children. The respondents availed their birth certificates as well as those of their siblings, which clearly indicated that the deceased was their father. We agree with the observation of the learned Judge that the authenticity of these birth certificates was not challenged by the appellants.

36. The appellants contended that the respondents had not been recognized by the deceased as his children, and further that they did not attend the deceased's burial. This contention was controverted by the respondents. The deceased's eulogy produced in evidence clearly listed the respondents, and their two siblings, as children of the deceased from his previous marriages. Further, the respondents availed photographs which evidenced the fact that they were present during the deceased's funeral. None of these documents was challenged by the appellants.

37. It is clear to us, as was correctly observed by the learned Judge, that the appellants intentionally failed to inform the probate court that there existed other beneficiaries entitled to inherit from the deceased's estate. The respondents were the beneficiaries of the estate of the deceased by virtue of the fact that they are children of the deceased.

38. With respect to the appellants' complaint to the effect that the probate court erred when it issued further orders appointing the respondents, together with the 1st appellant, as administrators of the estate of the deceased, and further cancelling any transmissions made pursuant to the revoked grant, it is our considered view that Section 47 of the *Law of Succession Act* grants the High Court inherent

powers to make appropriate orders in the interest of justice and for the preservation of the deceased's estate. The said section reads as follows:

> "The High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient: provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice."

39. Further, Rule 73 of the Probate and Administration Rules provides thus:

> "Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

40. The upshot of the foregoing is that the appeal lacks merit and is accordingly dismissed with costs to the respondents.

41. Orders accordingly.

DATED and DELIVERED at NYERI this 21st day of June, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR