Mwaja v Mwaja (Civil Appeal E078 of 2022) [2024] KECA 1055 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 1055 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E078 OF 2022

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JULY 26, 2024

BETWEEN

PETER MWEBIA MWAJA ..... APPELLANT

AND

GIKUNDA MWAJA ..... RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Meru (W.T. Cherere, J,) dated 12th August, 2021 in P & A Cause No. 94 of 2016)

JUDGMENT

1. The appellant is aggrieved by the manner of distribution of the estate of Mwaja M'Ibari alias Mwaja Ndatho (deceased) between his two houses as directed in the decision of W.T. Cherere, J. dated 12th August 2021. He has accordingly filed the present appeal in which he asks the Court to direct that the estate should be distributed as he had proposed before Chuka SPM Succession Case No.371 of 2012 and pursuant to the Certificate of Confirmation of Grant issued on 23rd July 2014.

2. The deceased died intestate on 8th January 1984 at Mwanganthia in Chuka. The deceased was polygamous, his first wife being Zipporah Karambu (deceased) while Priscilla Gatwiri Mwanja, the respondents' mother was the second wife. The deceased had 9 children, namely; Peter Mwebi Mwaja, Gerald Mugute Mwaja; Joanary Mutembei Mwaja; Shandrack Karani Mwaja; Zaburon Kinja Mwaja; Celina Kainda Mwaja; Jacinta, Kendi Mwaja; John Gikunda Mwaja and Muthuri Mwaja. The estate of the deceased comprised two properties, LR. No. Nkumari/Abogeta/Mitunguu/238 and LR. No. Nkuene/ Ngonyi/635.

3. A decade or so after the death of the deceased, the appellant, Peter Mwebia Mwaja, petitioned the Senior Principal Magistrate's Court at Chuka in P & A Cause Number 371 of 2012 for letters of administration intestate. He named his brothers and sisters from both houses as the beneficiaries of the estate. A grant was issued to the appellant on 5th September 2013 and subsequently a certificate of confirmation of grant was issued on 23rd July 2014.

4. Aggrieved by the said confirmation of grant the respondent filed summons for revocation or annulment of grant dated 9th July 2015 at Chuka Senior Principal Magistrate's Court subsequently transferred to the High Court at Meru. In the affidavit in support of summons of even date, the appellant averred that the grant was defective and was obtained by making false statements to the court; that the court at Chuka did not have any jurisdiction to entertain this matter because the subject matter is situated at Nkuene and Abothuguchi locations and that the High Court is also situated in Meru the nearest station where the subject properties are situated and finally that the petitioner is not fit to administer the Estate as he has even brought in intermeddlers who have started claiming the portions of the estate.

5. Upon hearing the summons, the High Court held that;

    16. From the foregoing I have deduced that it was the intention of the deceased that LR No. Nkumari/Abogeta/Mitunguu/238 be for the benefit of the petitioner/respondent's mother and her children and LR No. Nkuene/Ngonyi/635 be for the benefit of the protester/ applicant, his maternal half- brother Daniel Muthuri Mwaja and their mother Zipporah Karambu (deceased).

    17. From the foregoing analysis the orders which commends to me and which I hereby issue are that the summons for revocation dated 9th July 2015 has merit on the ground that the grant was obtained by the petitioner/respondent by making of false statement and concealment of material facts from court.

    18. The court also finds that the partitioning of LR No. Nkuene/Ngonyi/635 into three portions namely LR No. Nkuene/Ngonyi/ 1739, 1740 and 1741 all registered in the name of the petitioner/respondent was obtained fraudulently and the purported sale to John Muriithi of 1½ acre arising thereof cannot be protected under the Law of Succession.

    19. It is hereby ordered:

        1. The certificate of confirmation of grant issued on 23rd July 2014 distributing LR No. Nkuene/Ngonyi/635 to Peter Mwebi Mwaja 1½ acres, John Gikunda Mwaja 1acre and Muthuri Mwaja 1 acre be and is hereby amended in the following terms:-

            a. LR No. Nkuene/Ngonyi/635 is hereby distributed to Gikunda Mwaja and Muthuri Mwaja in equal shares

            b. The Land Registrar on whose jurisdiction LR No. Nkuene/ Ngonyi/635 is situated is hereby directed to cancel certificates of the title for LR No. Nkuene/ Ngonyi/1739,1740 and 1741 all registered in the name of the petitioner/ respondent and to effect the transfer of LR No. Nkuene/ Ngonyi/635 to Gikunda Mwaja and Muthuri Mwaja in equal shares.

            c. For avoidance of doubt LR No. Nkumari/Abogeta/Mitunguu/238 shall remain as distributed in the Certificate of Confirmation of Grant issued on 23rd July 2014.

            d. Each Party shall meet its own costs."

6. The appellant was aggrieved by the decision of the trial court. He filed a Notice of Appeal dated 16th August, 2021 and a Memorandum of Appeal dated 25th July 2022, in which he raised nine grounds of appeal. These are that the trial court erred in law and fact: in amending the lower court's grant dated 23rd July 2014 which did not exist having been revoked on 27th July 2016 (F.K. Gikonyo, J.)

and distributing the deceased's parcel of land number Nkuene/Ngonyl/635 to only two (2) deceased's beneficiaries and thereby disinheriting the other eight (8) deceased beneficiaries; in holding that the issue for determination was the distribution of the deceased's parcel of LR No. Nkuene/Ngonyi/635 and failing to consider, inter alia, the issue raised by the appellant and his witnesses on the paternity of the respondent; in holding that deceased distributed his property during his life time as gifts inter-vivos whereas there was no evidence; in holding that it was the intention of the deceased that LR No. Nkumari/Abogetea Mitunguu/238 be for the benefit of the Petitioner's/ Respondent's mother and her children and LR. No. Nkuene/ Ngonyi/635 be for the benefit of the protestor/applicant, his maternal half-brother Daniel Muthuri Mwaja and their mother Zipporah Karambu (deceased) whereas there was no evidence; in holding that the summons for revocation dated 9th July 2015 had merit on the ground that the grant was obtained by the petitioner/respondent by making of false statement and concealment of material facts from the court whereas there was no evidence; in holding that the partitioning of LR No. Nkuene/Ngonyi/635 into three portions namely LR No. Nkuene/ Ngonyi/1739, 1740 and 1741 all registered in the name of the petitioner/respondent was obtained fraudulently and the purported sale to John Muriithi of 1½ acres arising thereof could not be protected under the *Law of Succession Act* whereas there was no evidence in her evaluation of the evidence of the whole case; that the decision of the learned Judge is against the weight of evidence and applicable law and that the decision of the learned Judge is bad in law and a travesty of justice.

7. In his submissions dated 24th November 2022, the appellant on the first ground as to whether the learned Judge erred in denoting that the deceased made gift inter-vivos to his family members submitted that since the learned Judge characterized the two properties of the deceased to have been donated by the deceased to his family members during his lifetime that the learned Judge erred in classifying the said properties of the deceased as gifts inter-vivos without critically examining the jurisprudence that governs gifts inter-vivos and that the learned Judge misapplied the law as there were no properties of the deceased that could be classified as gifts inter-vivos.

8. Further it was submitted that it is not in dispute that the deceased had two properties in his name which featured in the trial court proceedings and which were LR No. Nkuene/Ngonyi/635 and LR No. Abothugu/Guchi/Kiija /283. Counsel added that it was noteworthy that during the proceedings in the High Court there was some confusion as to the correct deceased's parcels of land and that the appellant clarified and produced as PEX1 that parcels of LR. No. Abothugu/Guchi/Kiija/238 did not belong to the deceased and its inclusion in the lower court grant dated 23rd July 2014 was erroneous. Further, that the learned Judge failed to correct this error in her impugned ruling of 12th August 2021 and distributed the wrong parcel of land No. Abothuguchi/Kiija/238 instead of parcel of land No. Abothuguchi/Kiija/283.

9. It was submitted that in law there are two types of gifts, the gifts made between living persons (gifts inter-vivos) and gifts made in contemplation of death (gifts mortis cousa). Counsel relied on the case of Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR, for the holding that:

> "For gifts inter-vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter-vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee'Counsel also relied on the case of Re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR.

10. Hence it was submitted that for a property to be considered as a gift inter-vivos in the Law of Succession, the said gift must have been granted by the deed or by an instrument in writing or through delivery and in the case of land, as is in this case, through registered transfer where the land is duly registered. That there was nothing on the record to demonstrate that any of the aforesaid properties could be described as gifts inter-vivos in favour of any of the beneficiaries and as such the estate of the deceased remains for distribution in accordance with the provisions of the *Law of Succession Act*. It was submitted that the learned Judge misapplied the law in finding that the mere occupation of the property LR No. Nkeune/Ngonyi/635 by the respondent and his half-brother denoted a gift inter-vivos by the deceased at the exclusion of all the beneficiaries of the deceased.

11. On the issue of gift inter-vivos the appellant further relied on Micheni Aphaxard Nyaga & 2 others -vs- Robert Njue & 2 others [2021] eKLR and Odunga's Digest on Civil Case Law and Procedure Vol. (III) Page 2417 at paragraph 5484 (d)(e).

12. As to whether the respondent is a dependent under the *Law of Succession Act* it was submitted that Section 29 of the *Law of Succession Act* provides for the meaning of a dependant in the Law of Succession that:

> "Section 29 of the *Law of Succession Act*; "For the purposes of this Part, "dependant" means –
>
> a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
>
> b. such of the deceased's parents, step- parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half- brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
>
> c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

13. Counsel submitted that the provision serves the purpose of determining who a dependant is in the Law of Succession and that the learned Judge erred in law and in fact by failing to determine the question of whether the respondent is indeed the son of the deceased as he claimed. Further, that based on the evidence on record, PW2 the widow to the deceased indicated that she did not know the respondent as the son to the deceased and that the learned Judge completely disregarded the issue of whether the respondent is indeed a dependant despite the fact that it was an issue that was in contention.

14. Counsel also contended that the respondent is not a son to the deceased and does not, therefore, fall under the ambit of section 29 of the *Law of Succession Act* as a dependant. We were urged to find that the respondent did not prove sufficiently that he qualified as a dependant to the deceased and that the learned Judge gravely erred in ignoring this fundamental issue.

15. As to what orders this Court should make, it was submitted that we should be guided by the provisions of section 27 and section 29 of the *Law of Succession Act* in determining the appropriate orders to issue in this appeal and further that we should be guided by section 27 of the *Civil Procedure Act* (Cap. 21), that a successful party should normally be awarded costs of an action unless, for good reason, the court directs otherwise.

16. Finally, we were urged to allow the appeal by granting the orders as prayed for in the Memorandum of Appeal dated 25th July 2022.

17. In his submissions in reply, the respondent in regards to grounds 1 to 5 relied on Mwangi -vs- Wamugu [1984] KLR 453. It was submitted that it was the undisputed truth that the respondent has all along lived on LR No. Nkeune/Ngonyi/635 with his mother and brother throughout their lives exclusively and that the appellant's household has never set foot on the said land as their residence is in Mitunguu and Kiija where the respondent's household has not been provided for. It was further submitted that the obvious deduction of the deceased's intention was that the 1st household was settled on LR No. Nkeune/Ngonyi/635 while the 2nd household shall settle at Mitunguu and Kiija.

18. As regards paternity of the respondent it was submitted that the provisions of section 107(1) of the *Evidence Act* are very clear and that in the absence of any evidence to the contrary, the paternity of the respondent is that he is the 1st born of the deceased and his mother Zipporah Karambu was the wife of the deceased and her household was the 1st household of the deceased.

19. With regards to grounds 6 to 9, it was submitted that the principles of equity provide that "He who seeks equity must do equity". It was submitted that the deceased had three properties in his estate and that despite the respondent having lived on LR No. Nkeune/Ngonyi/635 throughout his life with his mother and brother, and despite neither the appellant nor his family having ever occupied any portion of the said land, the appellant proposes that he ought to benefit from the same. It was submitted that if at all the appellant wants a share in LR No. Nkeune/Ngonyi/635 then he should be ready to share out the other assets to the respondent and his brother Muthuri Mwaja.

20. Finally, it was submitted that the appellant's appeal lacks merit and that the appellants' interests are purely to unjustly enrich himself from the estate of the deceased at the exclusion of other family members which can be inferred from his illegal sale and transfer of a portion of the estate in LR No. Nkeune/ Ngonyi/635 which informed the respondent of the succession case which was done in concealment. We are urged to dismiss the appeal with costs to the respondent.

21. This being a first appeal, this Court's mandate was espoused in Ng'ati Farmers' Co-Operative Society Ltd. -vs- Ledidi & 15 Others [2009] KLR 331 as follows:

> " An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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."

This mandate was reiterated in the case of Kenya Ports Authority -vs- Kuston (Kenya) Limited [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

22. We have critically re-evaluated the evidence as analyzed above. In the course of the said re-evaluation, a pertinent issue in this appeal has come to our notice. We have observed that this is actually an appeal from the decision of the High Court pursuant to section 47 *Law of Succession Act*, and so the High Court was not acting in its original jurisdiction. Undoubtedly, this is a succession matter that is covered by the *Law of Succession Act*. A question of jurisdiction therefore arises. Although none of the parties raised this issue, it being a fundamental jurisdictional issue, the Court is enjoined by law to raise and determine the issue suo motu. Faced with a similar situation, this Court in Hafswa Omar Abdalla Taib & 2 others -vs- Swaleh Abdalla Taib [2015] eKLR expressed itself as follows:-

> " Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to be aware of it. Accordingly, this Court can suo motu raise and determine the same." (Emphasis supplied).

23. There is a long line of authorities in which it has been held consistently that no appeal lies to this Court in succession matters unless with leave. This was echoed in Rhoda Wairimu Karanja & Another -vs- Mary Wangui Karanja & Another [2014]eKLR:-

> " We reiterate that section 50 of the *Law of Succession Act* is clear that decisions from the magistrate's courts are appealable to the High Court and the decision of the High Court is final. Decisions of the Kadhis Court, on the other hand are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal. But section 47 of the *Law of Succession Act* makes no mention of an appeal to the Court of Appeal from the decision of the High Court made in the exercise of the latter's original jurisdiction."

24. In a recent appeal, this Court held in John Mwita Murimi & 2 Others v Mwikabe Mwita & Another [2019] eKLR:

> " 10. It is not in dispute that the impugned ruling in this matter arises from a succession cause and the respondents did not obtain leave to appeal. The decision in Makhangu -vs- Kibwana [1996] EA cited by the respondent was succinctly considered by this Court in Rhoda Wairimu Karanja & another -vs- Mary Wangui Karanja & another [2014] eKLR. In analyzing the Makhangu decision (supra), this Court held 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. (See also in Re Estate of Mbiyu Koinange (Deceased) [2015] eKLR; HCC Succession Cause No. 527 of 1981)."

25. There is no contestation that no leave to appeal was sought or granted in this matter. There was, therefore, no basis for the appellant to approach this Court on appeal as he did. Having so found, it is evident that we have no requisite jurisdiction to deal with this appeal and we must down our tools before interrogating its merits or otherwise. Consequently, this appeal fails and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY 2024

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

Certify that this is the true copy of the original. Signed

DEPUTY REGISTRAR