Kubai v Kubai (Civil Appeal 628 of 2019) [2024] KECA 845 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 845 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 628 OF 2019

SG KAIRU, GWN MACHARIA & F TUIYOTT, JJA

JULY 12, 2024

BETWEEN

ANDREW KAMAU DENIS KUBAI ..... APPELLANT

AND

CHRISTINE GAKUHI KUBAI ..... RESPONDENT

(Being an appeal from the Ruling and Orders of the High Court at Nairobi Family Division (Ongeri, J.) dated 2nd August 2019)inSuccession Cause No. 1940 of 1996 consolidated withSuccession Cause No. 1860 of 1996)

JUDGMENT

1. This is an appeal against a ruling dated 2nd August 2019 delivered by A. Ongeri, J. vide which she confirmed the Grant of Probate issued on 19th December 2013 to Christine Gakuhi Kubai (the respondent) based on a Will dated 19th January 1991 ("the Will") of Fredrick Polwarth Kibuthu Kubai (the deceased).

2. A synopsis of the facts is that the deceased died testate on 1st June 1996 survived by five (5) wives. The respondent filed for a petition of Grant of Probate in Succession Cause No. 1860 of 1996 while Samson Owen Kubai Kibuthu, Stephen Gideon Kibuthu F. Kubai, Gideon Blacklaw Kubai and Martin Gideon Kubai in their capacities as sons of the deceased, filed Succession Cause No. 1940 of 1996 in which Grant of Letters of Administration were issued and subsequently confirmed on 4th March 1998 by Sheikh Amin, J.

3. It suffices to state at the outset that the appellant is a grandchild of the deceased.

4. The respondent got wind of the issuance of the grant, and by an application dated 22nd June 1998 she applied for, among others: stay of execution of the grant issued to the sons of the deceased; and that there be no further dealings in the deceased's estate. The facts upon which the application was

premised are that the deceased died having left a valid Will, and that the sons of the deceased obtained the grant of the letters of administration through concealment of material facts.

5. The two succession causes were consolidated. The learned Judge (Musyoka, J.) gave due consideration of the evidence by all the parties and condensed the issues for determination into two: whether there was a valid Will left by the deceased; and whether the respondent was a wife to the deceased. In his judgement of 19th December 2013, the learned Judge found in the affirmative on the two issues and further ordered that the Grant of Probate of the Will be issued to the respondent.

6. Dissatisfied, the appellant filed an application dated 9th April 2014 challenging the decision of 19th December 2013. The application was heard and by a ruling dated 4th June 2014,Kimaru, J. (as he then was) dismissed the application. Undeterred, the appellant filed an application dated 25th November 2014 seeking revocation and/or annulment of the Grant of Probate issued to the respondent on 19th December 2013. The application was heard before Muchelule, J. (as he was then) and by a ruling dated 13th March 2015, the learned Judge dismissed the application on the basis that it raised same issues which were already heard and determined.

7. Ever so determined, the appellant filed Summons for Revocation of Grant dated 11th February 2019 seeking that the Grant of Probate issued to the respondent on 19th December 2013 be revoked and/or annulled. On the other hand, the respondent filed Summons for Confirmation of the Grant dated 23rd April 2019. In retaliation to the application for Summons for Confirmation of Grant, one Moses Mendza Kibuthu Kubai filed an affidavit of protest sworn on 3rd June 2019. The arguments by the respective parties were heard before A. Ongeri, J. and she delivered her ruling on 2nd August 2019.

8. To start with, the learned Judge held that there was no appeal against the judgement of Musyoka, J. dated 19th December 2013. She observed that the subsequent attempts to review the said judgement were dismissed through rulings delivered on 4th June 2014 and 26th January 2017 by L. Kimaru & Muchelule, JJ. (as they then were) respectively. She emphasised that she also delivered a separate ruling dated 1st April 2019 where she restated that the judgement of Musyoka, J. has never been appealed against. She opined that since the judgement was not challenged, the issues regarding the validity of the Will could not be challenged in the application before her.

9. The learned Judge went on further to observe that the deceased made reasonable provision for all his beneficiaries including even the former wives and their children; that there was no basis to interfere with the wishes of the deceased; and she consequently confirmed the Grant of Probate issued to the respondent on 19th December 2013.

10. It is those findings which gave rise to this appeal before us, which is anchored on 20 grounds of appeal which we have collapsed into the following 6 grounds as follows:

    i. The learned Judge misdirected herself in finding that the appellant was not a beneficiary hence, he had no locus standi to file proceedings and by failing to take into account the fact that the appellant was acting on behalf of his late father, one Samson Owen Kibuthu Kubai by virtue of a Power of Attorney donated to him by his mother, one Florence Mumbi Kubai, the administrator to the said estate.

    ii. The learned Judge misdirected herself by failing to consider the appellant's Summons for Revocation of Grant dated 11th February 2013 but instead directed the respondent to file an application for Confirmation of the Grant.

iii. The learned Judge erred in law and in fact in failing to perceive that the appellant's father, one Samson Owen Kibuthu Kubai had been left out in the Summons for Confirmation of Grant as a beneficiary.

iv. The learned Judge erred in failing to consider the appellant's application for reasonable provision filed under section 26 of the *Law of Succession Act* dated 29th May 2019 and his Affidavit of Protest dated 29th May 2019.

v. The learned Judge erred by using the typed Will as the basis for Confirmation of Grant when the same had been invalidated by Musyoka, J. on 9th December 2013.

vi. The learned Judge erred in confirming the Grant of Probate issued on 19th December 2013 while there was another dated 20th January 1997 confirmed on 4th March 1998 in the names of Stephen Gideon Kubai, F. Kubai, Samson Owen Kubai Kibuthu, Gideon Blacklaw Kubai and Martin Gideon Kubai which had not been revoked.

11. The appellant urged us: to set aside the ruling and order in Succession Causes 1940 of 1996 consolidated with 1860 of 1996, delivered on 2nd August 2019; revoke the Grant of Probate issued by Musyoka, J. on 19th December 2013; to adequately provide for all the beneficiaries in the distribution of the deceased's estate; and that costs herein be borne by the respondent.

12. The appeal was canvassed by way of written submissions. Those of the appellant are dated 28th August 2020 while those of respondent are dated 11th September 2020. At the plenary hearing, learned counsel Mr. A.G.N. Kamau appeared for the appellant while learned counsel Dr. Gibson Kamau Kuria, SC, appeared for the respondent.

13. Mr. A.G.N. Kamau condensed the issues for determination into five clusters. Under the first cluster, counsel submitted that the Grant of Probate issued to the respondent in Succession Cause No. 1860 of 1996 and confirmed on 4th March 1998 was never formally revoked; that therefore, the court issued a Grant in favour of the respondent while there existed a Grant for Letters of Administration previously issued in Succession Cause No. 1940 of 1996 to Samson Owen Kubai Kibuthu, Stephen Gideon Kibuthu F. Kubai, Gideon Blacklaw Kubai and Martin Gideon Kubai; and that the Grant of Probate was based on a Will which is impeachable and tainted.

14. The second argument was in respect to the validity of the Will which the appellant contends is not valid, and that therefore, it cannot form the basis of the probate upon which the respondent would administer the estate of the deceased. The deceased in this case left an estate with many wives, sons, daughters and grandchildren and, as such, the Will that allegedly gave the respondent the power to administer the entire estate, yet she was only one of the widows of the deceased, was tainted. Counsel referred us to this Court's case of *John Wagura Ikiki & 7 Others v. Lee Gachigia Muthoga* (2019) eKLR on what constitutes a valid Will.

15. Thirdly, was the issue of whether the appellant had the locus standi to institute this appeal, which counsel submitted in the affirmative. He hinged the argument by virtue of the Power of Attorney issued to him (the appellant) by his mother who had applied for grant of letters of administration in respect to his deceased father, Samson Owen Kubai Kibuthu. In this regard, counsel relied on the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR.

16. Fourthly, it was counsel's submission that the High Court failed to consider that a confirmation of grant is time bound, and there are attendant serious repercussions when delay occurs. According to the counsel, the learned Judge allegedly cured the delay by requesting the respondent to make an application for the confirmation of the probate out of time; and that in converse, the appellant's

application in the High Court was not dealt with and the court treated it as having been abandoned without giving reasons for doing so.

17. Fifthly and finally, Mr. Kamau submitted that the appellant filed an affidavit of protest on 29th May 2019, seeking that reasonable provision be made to all beneficiaries in accordance with the provisions of section 26 of the *Law of Succession Act*. He contended that the appellant's gist of complaint is that the High Court did not address this issue resulting to the appellant, other children and relatives of the deceased being dis-inherited. To this end, counsel relied on the cases of *Elizabeth Kamene Ndolo v Geroge Matata Ndolo* [1996] eKLR and *Lita Violet Shepard v. Agnes Nyambura Munga* [2018] eKLR.

18. Opposing the appeal, Dr Kamau Kuria, SC, submitted that when the deceased died, the respondent filed Succession Cause No. 1860 of 1996 but instead of the family members filing a cross petition, they chose to file Succession Cause 1940 of 1998. It was submitted that the two succession causes were heard together and Succession Cause No. 1860 of 1996 was treated as the petition and the Succession Cause No. 1940 of 1998 as an answer to the petition and cross petition.

19. Senior counsel submitted that on 19th December 2013, Musyoka, J. delivered a judgment and focused on two issues. First, on the validity of the handwritten Will of the deceased, which he found to be valid and secondly, whether the respondent was a wife to the deceased, which again he found in the affirmative. The learned judge also held that the deceased's five wives had been well provided for.

20. Counsel submitted that section 40 of the *Law of Succession Act* provides that in a polygamous household, property is divided amongst the houses where the deceased died intestate; that the appellant got his provision through the properties that were bequeathed to his deceased father's household, which issue was ably considered by Ongeri, J. who heard the Summons for Confirmation of the Grant. It was urged that it follows then that there was no grant of letters of administration that was left unconfirmed in Succession Cause No. 1940 of 1998, contrary to the appellant counsel's submission.

21. Counsel stated that although the appellant filed a Notice of Appeal, he failed to apply for leave before the High Court to appeal against the judgment of Musyoka, J., and more importantly, he did not lodge an appeal against that judgment. Consequently, the Will cannot be challenged at this stage. We were urged to take note of the fact that the appellant is just but a perpetual nagging litigant who is vexing the court for no apparent reason.

22. On the issue of locus standi, it was submitted that it is settled law that no person can bring a suit, including an appeal like the one before this Court unless that person holds a grant of representation. For this proposition, counsel referred to the case of *Trouistik Union International & Another v Jane Mbeyu & Another* [1993] eKLR. Counsel stated that in this case, the appellant purports to have filed an application in the High Court on the basis that he was an Attorney of his mother who held a Grant of Representation. However, even if he held a Power of Attorney, the same can never substitute a grant of representation. Hence, he had no locus standi to file any of the applications in the High Court or the present appeal, all of which are misconceived in law.

23. Finally, counsel urged us to dismiss the appeal so as to allow the respondent who is in her sunset years to enjoy the fruits of her judgment, more so having regard to the fact that her husband died 28 years ago; and that in any event, by so doing, we shall be upholding the doctrine of finality to litigation.

24. We have given due consideration to the record of appeal before us, the arguments by counsel representing each party and the law. This being a first appeal, we have to re-appraise the material before the High Court as we are mandated under rule 31 (1) of the Court of Appeal Rules, 2022 and confine our scope as expounded in *Selle v Associated Motorboat Company Limited* [1968] EA 123 which is

to re-consider and re-evaluate the evidence adduced before the trial court and come up with our own conclusion. In doing so however, we have to bear in mind that we neither saw nor heard the witnesses give their evidence and give due allowance for that.

25. Taking the above to mind, we have demarcated the issues that fall for determination to be: whether the appellant is a beneficiary and if not whether he has the locus standi to contest the proceedings relating to the deceased's estate; and whether the validity of the Will can be challenged at this juncture.

26. It is undisputed that the appellant is the grandson to the deceased, Fredrick Polwarth Kibuthu Kubai. The appellant is the son of Samson Owen Kubai Kibuthu (also deceased) and his mother is Florence Mumbi Kubai. As we have understood it, the appellant's contention is that no adequate provision was made to his deceased father in his grandfather's estate. Thus, he makes his claims on behalf of his deceased father.

27. The appellant argues that he derives the locus standi to institute these proceedings on behalf of his deceased's father estate by virtue of a Power of Attorney donated to him by his mother. The respondent was of a contrary view, insisting that the appellant did not have locus standi since he did not have a grant of representation.

28. The term locus standi means the right to bring or institute an action in court and conversely, a person who has no right to bring an action in court does not have a locus standi and cannot bring an action. The importance of locus standi is that it gives a person the legitimacy to be heard in a case in which they may not even have a direct interest. Article 22 of the *Constitution* of Kenya 2020 on enforcement of the Bill of Rights is a case in point.

29. This Court in *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR espoused the place of the doctrine of locus standi in court proceedings in the following terms:

> " The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

30. The Power of Attorney which the appellant is referring to is a general Power of Attorney dated 7th November 2017. Undoubtedly, it was donated to him by his mother, Florence Mumbi Kubai as the administratrix of the Estate of the appellant's deceased father. We have read and certainly appreciated all the 12 clauses of the said Power of Attorney.

31. Of interest is clause 2 of the Power of Attorney, which we find relevant to this appeal. The powers donated to the appellant therein was to commence any legal action or proceedings for and on behalf his mother against any third party or any other relevant party arising out of any dispute or all disputes connected with the operation and/or running of the Estate of Samson Owen Kibuthu Kubai (Deceased) and Kubai Investments Limited' where the deceased was one of the Directors.

32. To our minds, the power donated to the appellant was limited to any legal action which touched on the estate of his deceased father wherein his mother is an administratrix. Those powers did not extend to any legal action which involved the estate of his deceased grandfather.

33. We have considered the facts in the case of Juletabi African Adventures Limited (supra) which the appellant relied upon to justify the assertion that by virtue of possessing a Power of Attorney, he could bring action on behalf of other persons. The facts giving rise to the Juletabi case revolved around a partnership agreement which went sour. None of the parties were adjudged to have been deceased for the court to consider the proprietary of the Power of Attorney, if any.

34. Even from another perspective, still the appellant is unable to surmount the argument that he lacked locus standi. Section 29 of the *Law of Succession Act* defines "dependant" in the first instance to mean "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." A deceased's parents, stepparents, grandparents, grandchildren, stepchildren or children whom the deceased had taken into his family and so forth fall into the second category of persons who can be termed as dependants.

35. It is trite law that dependency is a matter of fact, which must be ascertained based on the existing facts as at the time of the death. See the decision by this Court in *Wilson Chumo v Messrs Kapsimatwo Express* [1992] eKLR. There is no doubt that the appellant, as a depandant of the deceased was well provided for under the house of his father. He however now claims that he can pursue the alleged inadequate provision of the estate of the deceased on his behalf and that of other children who were not adequately provided for by virtue of the Power of Attorney donated to him by his mother. As earlier indicated, the Power of Attorney donated to the appellant by his mother was limited to 'any legal action which touched on the estate of his deceased father wherein his mother is an administratrix', did not extend to any legal action which involved the estate of his deceased grandfather.

36. Accordingly, we make the inescapable conclusion that the appellant did not have the locus standi to commence any proceedings as the Power of Attorney donated to him was limited in scope of its application.

37. At this point, we can down our tools as this appeal already fails on the issue of locus standi. We are cognizant that in this appeal we are not being called upon to disturb the decision of 19th December 2013 by Musyoka, J. However, cognizant that the issue of the validity of the deceased's Will as the basis upon which the estate was distributed was raised as a ground of appeal, we think it is paramount to make a determination on whether it (the Will) can be challenged at this stage.

38. According to the appellant, his deceased father was not adequately provided for in the Will. In the Will, the deceased clustered the five houses together with their children. A reading of the Will reveals that the deceased did not clearly mention the children of each of the five houses. The appellant has also not been useful in both these proceedings and those in the High Court by stating from which house his father hailed from.

39. However, we take cue from the Grant of Letters of Administration intestate dated 11th September 1996 filed by the appellant's deceased father and others in their capacity as the sons of the deceased in Succession Cause No. 1940 of 1996. The persons listed as widows were Sophy Muthoni Kibuthu and Rebecca Wangeci Kubai. Therefore, the appellant's father may have come from either of these two houses.

40. In respect of the two widows, the deceased wished as follows in the Will:

    a. I parted with Sofia Muthoni in 1964. Her three sons followed her but all the same, I built her a 3- flat house in Lunga Lunga Nakuru. I gave each son 5 acres of land.

    b. Rebecca Wangechi - I parted with her in 1971 – she ran away leaving me with two sons and a daughter and I educated them to Form 4. I gave each of the sons and daughter 5 acres of land and education.

41. Therefore, there is no doubt that the sons and daughters of the houses of Sofia Muthoni and Rebecca Wangechi were each allocated 5 acres of land. The appellant's allegation that his father was not adequately provided for, is rather vague. The appellant is not stating out of the whole estate of the deceased, what he thinks his father ought to have been entitled to.

42. We have given due consideration to the evidence led by the sons of the deceased who were the objectors in the High Court on the question of the validity of the Will. At paragraphs 17 and 20 of the judgement, Musyoka, J. recorded as follows:

> " Although the handwritten document was placed before the children of the deceased who testified as objectors' witnesses, I noted that none of them denied that the writing on the piece of paper was that of their deceased father. I also noted that none of them denied that the signature in the photocopy alleged to be that of the deceased was in fact that of the deceased... on the evaluation of the evidence on the validity of the handwritten document dated 19th January 1991, it is my conclusion that the same satisfied the requirements of Section 11 of the *Law of Succession Act*. It was properly executed by its maker and properly witnessed and attested. There is nothing to show that the marker was not of sound mind at the time he made the Will."

43. From the decision of the learned Judge, we draw the conclusion that the Will being challenged was found to be a valid Will and the deceased's sons did not challenge its authenticity. It therefore follows that the beneficiaries of the deceased's estate were satisfied by the mode of distribution in their deceased father's estate. It is only the appellant who is not a beneficiary of the deceased's estate who is keen on disturbing the wishes of the deceased through convoluted and ceaseless applications.

44. The judgement rendered on 19th December 2013 has never been a subject of appeal in any court of competent jurisdiction. We agree with the learned Justices L. Kimaru and Muchelule, JJ.A. (as they then were) and Asenath, J. in stating that in the absence of an appeal against the decision of Musyoka, J., the High Court was not the proper forum to challenge any further issues regarding the validity of the deceased's Will.

45. With the foregoing in mind, the appellant's appeal is without basis and therefore devoid of merit. We accordingly dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR