In re Estate of Gwonda Kebate, Kebate Kebate, Ondande Kebate & Onchere Kebate (Deceased) (Civil Appeal 108 of 2019) [2024] KECA 784 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KECA 784 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 108 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JULY 5, 2024

IN THE MATTER OF THE ESTATE OF GWONDA KEBATE, KEBATE KEBATE, ONDANDE KEBATE AND ONCHERE KEBATE (DECEASED)

BETWEEN

PATRICK ONGECHI NYABUTO ..... 1ST APPELLANT

ERICK ONGECHI AKUNGA ..... 2ND APPELLANT

JUSTIN ABURI OMUYA ..... 3RD APPELLANT

AND

ROSE BWARI ONDIEKI ..... RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Kisii (Majanja, J.) dated 20th May 2019 in Succ. Cause No. 47 of 2000)

JUDGMENT

1. The appellants, Patrick Ongechi Nyabuto, Erick Ongecha Akunga and Justin Aburi Omuya being dissatisfied with the ruling and and/or decision of the High Court dated and delivered on the 20th May 2019, appeal against the whole of the said ruling/decision on the grounds that the learned trial judge erred in law and fact by:

> failing to appreciate the law and evidence tendered in court; in holding that three of the deceased persons died in 1960s contrary to the death certificates and the chief's letters filed; holding that the estates were governed under customary law and therefore the respondent was entitled to it; holding that the estate was given to the respondent as a gift without any evidence; failing to appreciate that the respondent being a daughter in law does not feature in the line of consanguinity in inheritance of the estate of her father in law; dismissing

the appellants' application for confirmation of grant irrespective of the listing of lawful beneficiaries in the chief's letters.

2. The appellants propose that the appeal be allowed; and the orders in the ruling of High Court dated 20th May 2019 be set aside; and substituted with an order allowing the application dated 19th September 2018.

3. The genesis of this matter revolves around the deceased persons, Gwonda Kebate, Ondande Kebate, Onchere Kebate and Kebate Kebate, brothers who neither married nor had children; and were registered as proprietors in common of the suit property known as Nyaribari Chache/B/B/ Boburia/2460 ("Plot 2460"). The deceased brothers never lived on the suit property. According to the death certificates produced, Onchere, Ondande and Kebate died in the 1960's while Gwonda died on 17th August 1991. The respondent, Rose Bwari Ondieki ("Rose"), who was their daughter in law, (in the sense that she had married Charles, the son of Ondande Kebate) applied for and obtained letters of administration [to the estate of Gwonda Kebate] and, in due course, the grant was confirmed on 19th March 2000 resulting in her taking Plot 2460 absolutely.

4. Ultimately, the applicants sought to revoke the grant vide summons for revocation dated 19th September 2018, stating that, as the first cousins of the deceased brothers, they were the lawful beneficiaries to the estate of the deceased persons; and that the grant of letters of administration was irregular as the respondent did not rank in priority to the cousins; and she had concealed material facts by failing to name the beneficiaries of the deceased; and proceeding to register the suit plot for herself and children; and that the respondent was out to disinherit the beneficiaries of the estate.

5. The respondent's case was that Gwonda, the last of the brothers to die, gave Plot 2460to her husband, Charles as a gift for taking care of him in his old age; and when Charles died, the respondent continued to take care of Gwonda till his death. The respondent's witness Isaac Aburi Ongechi (DW1), her brother in-law, confirmed this and further testified that the family members never complained about Charles and Rose keeping Plot 2460 and the objection was a recent issue.

6. Rose further testified that when she married Charles, she found Gwonda on Plot 2460, and that since he did not have a proper house, they built one for him, took care of him until his death, and that she had been living on said property for 24 years without any issue.

7. Vide a ruling dated 20th May 2019, the trial judge was satisfied that Charles was given Plot 2460as a gift, and Rose as a wife was entitled to apply for letters of administration. The court was also of the opinion that even though Rose was required to disclose the other beneficiaries, the cousins, the court saw no reason to revoke the grant, noting that the applicants also failed to disclose beneficiaries as well. The learned judge made the following observation:

> " Three of the deceased persons died in the 1960's when the Law of Succession Act (Chapter 160 of the Laws of Kenya) ("the Act") was not in force. By virtue of section 2(1) thereof, distribution of their respective shares was governed by customary law. Since the three brothers died and left Gwonda, he effectively inherited their shares in Plot 2460. As Gwonda died in 1999, the Law of Succession Act applies to the administration and distribution of his estate which includes the shares left behind by his brothers. The applicant's case is grounded on the provisions of section 39 of the LSA ...
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> The application of section 39 of the LSA would mean that the deceased's cousins and their heirs would be entitled to the property in equal shares. However, section 39 aforesaid is not absolute. It is also subject to section 42 of the LSA"

8. The court also pointed out that despite the appellants claiming that Rose intended to disinherit them, she had shown in her affidavit that each of them had parcels of land and could not claim that they were fully dependent on the suit plot, and the appellants had not fully discharged the burden of proving that the grant ought to be revoked. The summons for revocation of the grant was thus dismissed.

9. The appellants, aggrieved by the decision of the trial court, filed their memorandum of appeal challenging the ruling of the Superior Court on 6 grounds of appeal.

10. On whether the court erred in law and in fact by holding that the estate was administered according to customary law, the appellant contends that Plot 2460 was registered in the names of the four deceased brothers each holding a quarter share

    meaning that their respective shares were defined. As such, they argued, each deceased person was entitled to independent administration of his estate depending on the dependants and beneficiaries as provided for in the Act. The appellants further contend that the law applicable was the Law of Succession Act and not customary law as the last two brothers died after the Act came into force, that is according to the appellants, in 1982.

11. Drawing from the provisions of section 39 and 42 of the Act, the appellants also argue that there was no evidence before the trial court that Gwonda bequeathed his property to Charles.

12. On whether the deceased's person's estate could be administered jointly, it is the appellants' case that the deceased persons were registered in common each holding a quarter share, and as such the said estates were to be administered independently under section 29 of the Act. The appellants argue that administering the estates jointly by the respondent in exclusion of all other dependents was irregular as they were not provided for and were, in turn, disinherited.

13. On whether the respondent was the sole dependent/beneficiary of the estate, the appellant submits that the respondent was not the sole dependent/beneficiary of the 4 estates and that the court erred in conferring all the four estates to the respondent without cogent proof, and that irrespective of the fact that the brothers were not married, each had their own respective dependants who were entitled to inherit the estate.

14. As to whether the estate was given to the respondent as a gift inter vivos - the appellant insists that the suit property was divided into 4 hence four estates and not one, and that there was no justifiable basis under which the estate could be treated as a gift inter vivos to the respondents to the exclusion of the other beneficiaries.

15. The respondent, on the other hand, argues that the learned judge was correct in finding that the appellants did not present any evidence that the grant was defective and/or was obtained fraudulently. The respondent also agrees with the court that the suit property was given as a gift and that should anyone have a claim over the suit parcel they should file suit in the Environment and Land Court.

16. The respondent contends that this being a succession cause, leave to appeal was necessary and the appellant did not seek leave and as such the appeal was devoid of merit, this Court lacking jurisdiction to entertain the appeal.

17. This being a first appeal, and as has been reiterated in several decisions of this Court, it is this court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated in Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.

18. In our view, the main issues in this appeal are:

i. Whether this court has jurisdiction to entertain the appeal without leave

In Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others [2013] eKLR Otieno Odek, JA stated as follows:

"I have anxiously considered the application, the affidavits on record and submissions by counsel and the law. I am of the view that it is crucial to consider at this juncture whether the applicant was required to have obtained leave to appeal from the High Court under Section 50 of the Law of Succession Act; and if so what is the consequence of the failure to obtain such leave. Section 50 of the Law of Succession Act provides:

'50 (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 the deceased Muslim and with prior leave thereof in respect of any point of Muslim law, to the Court of Appeal."

19. The intended appeal herein is in respect of the decision of the High Court dismissing the applicant's application for revocation of grant. In my view what was before the High Court was not an appeal from the decision of the magistrate's court but an application for revocation of grant which clearly does not fall within the provisions of Section 50 of the Law of Succession Act. There is no provision in the Law of Succession Act which required the applicant herein to obtain leave to appeal against the decision of the High Court dismissing the application for revocation. It is trite law that where any proceedings are governed by a special Act of Parliament, like in this case, the Law of Succession Act, the provisions of such an Act must be strictly construed and applied. See Josephine Wambui

Wanyoike vs, Margaret Wanjira Kamau & Another – Civil Appeal No. 279 of 2003 & H. Adongo & Others vs Savings and Loan Society (Kenya) Ltd.- Civil Appeal No, 22 of 1987.

20. Therefore, what is in the Law of Succession Act is what was intended to be therein in the manner and extent it is there. What is not therein expressly is what was intended not to be there by the legislator. I find that the applicant in this case was not required to seek leave to appeal from the High Court. However, Odek, JA's views are an outlier and have been rejected by most benches – including in Joyce B. Nyamweya vs Jemima N. Nyamweya & Another [2016] eKLR); as well as Dhadialla v Chaudhri (Sued as the Executor of the Estate of Gurdip Kaur Sagoo) & 2 others (Civil Appeal (Application) E309 of 2021) [2023] KECA 583 (KLR) (26 May 2023) which stated that:

> " It is trite law that, in succession matters, there is no automatic right of appeal to this Court without leave (see Rhoda Wairimu Karanja & Another vs Mary Wangui Karanja & Another (supra) and John Mwita Murimi & 2 Others vs Mwikabe Chacha Mwita & Another [2019] eKLR)."
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> In the specific circumstances of this case, we easily agree with the Dhadiala Case (supra) that, as a general matter, one needs leave to appeal to the Court of Appeal on succession matters and leave was not obtained. The appeal herein is, therefore, infirm on that account. As we demonstrate below, however, the result would not be different even if we considered the appeal on its substantive merits.

21. On the issue as to whether the property was held jointly or held in common, the distinction between two was brought out in Isabel Chelangat v Samuel Tiro Rotich & 5 others (2012) eKLR, in the following terms:

> "At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts, Megary & Wade, The Law of Real Property [2] and Cheshire & Burn's, Modern Law of Real Property, [3]. According to Burn, "...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares..." [4]. Further, that "there is a thorough and intimate union between joint tenants. Together, they form one person.
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> A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and "four unities". The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are
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> i. The unity of possession.
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> ii. The unity of interest.
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> iii. The unity of title.
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> iv. The unity of time.
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> On unity of possession, each co-owner is entitled to possession of any part of the land as the other One co- owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. [7] Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.
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> Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co- tenants. [8] In other words they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.'

The register in respect of Nyaribari Chache/B/B/Boburia did not indicate whether the proprietorship was joint or in common. However, going by what is stated in Cheshire & Burn's, Modern Law of Real Property cited above, a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares. Applying this principle to the present case, this Court would hold the deceased brothers as joint proprietors. That is to say that a presumption would arise that the tenancy is intended to be joint.

22. Was Plot 2460 gifted to the respondent's husband? We agree with the trial court that there was sufficient unrebutted

testimony that Plot 2460 was, indeed, gifted to the respondent's husband by Gwonda, the last brother to pass on, as a gesture of gratitude for taking care of him in his old age, living on the suit land without protest from the family members for over 18 years or so.

23. The appellants have brought their claim under section 39 of the Law of Succession Act meaning that the deceased's brothers' cousins and their heirs would be entitled to the property in equal shares. Indeed, as observed by the learned judge, section 39 is not absolute and is subject to section 42 of the Law of Succession Act. Once the respondent's deceased husband was given the suit property by Gwonda, she was then entitled upon his demise to apply for letters of administration. It has come out from the record that the appellants had their own parcels of land and were not dependent on the suit property. We, thus, agree with the learned judge that the appellants did not discharge their burden to show that the grant issued and confirmed to the respondent should be revoked as per the provisions of section 76 of the Law of Succession Act.

24. In conclusion this appeal fails and the same is dismissed. Each party to bear their own costs, this being a family matter.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR