Waiyaki & another v Kamau & another (Civil Appeal 456 of 2018)
[2024] KECA 1151 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1151 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 456 OF 2018

DK MUSINGA, M NGUGI & JM MATIVO, JJA

SEPTEMBER 20, 2024

BETWEEN

PETER KIRUKU WAIYAKI ..... 1ST APPELLANT

JANET NJERI WAIYAKI ..... 2ND APPELLANT

AND

CAROLINE WANJIRU KAMAU ..... 1ST RESPONDENT

JACKLINE WANGARI KAMAU ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Musyoka, J.) delivered on 29th September 2017 in HCSC No. 1154 of 2010 Consolidated with HCSC No. 1596 of 2010 Now Kiambu HCSC No. 132 of 2017)

JUDGMENT

1. This appeal revolves around the administration and distribution of the estate of one Gedraph Kamau Waiyaki (deceased), who died on 9th August 2009.

2. The respondents, Jackline Wangari Kamau (hereinafter referred to as 'Jackline'), and Caroline Wanjiru Kamau (hereinafter referred to as 'Caroline'), vide a Petition dated 9th June 2010 petitioned for grant of letters of administration intestate to the estate of the deceased vide Succession Cause No. 1154 of 2010. The only asset identified in the said petition was Muguga/Gitaru/2386. After gazettement, a Grant of Letters of Administration Intestate (the grant) was issued on 22nd December 2010. The grant was subsequently confirmed and the said property was shared equally between the two.

3. In the year 2011, another Succession Cause, to wit, HCSC No.1596 of 2011, was initiated by Peter Kiruku Waiyaki and Janet Njeri Waiyaki (the appellants herein), who described themselves as siblings of the deceased. Jackline and Caroline were listed in the petition as stepchildren of the deceased and the

assets of the deceased were said to include Muguga/Gitaru/2379 and Muguga/Gitaru/2386. However, the said petition was never gazetted and therefore, a grant was never made in that cause.

4. On 5th June 2012, summons for revocation of the grant issued in favour of Jackline and Caroline was lodged by the appellants, alleging non-disclosure, fraud and concealment of relevant matter in obtaining the grant. The appellants averred in their supporting affidavit that the administrators (Jackline and Caroline) were not biological children of the deceased, for their mother had been married to another man prior to marrying the deceased, and that she had the two children from the earlier union. They alleged that the two did not disclose that the deceased had been survived by other persons, and that he possessed other assets. They further averred that the assets in the name of the deceased were in fact ancestral property.

5. Opposing the summons for revocation, the respondents contended that there was no misrepresentation as they were the only children who survived the deceased; that the deceased had married their mother under Kikuyu customary law in the year 1998; that their union was solemnized in the year 2006; and that their mother predeceased the deceased, leaving them under the care of the deceased.

6. As regards the priority to petition for letters of administration, they contended that they ranked in priority to the siblings of the deceased. They also denied having failed to disclose all the assets of the deceased, as it was only Muguga/Gitaru/2386 which was in their knowledge at the time. However, they later learnt that the deceased also owned Muguga/Gitaru/2379. They annexed to their affidavit birth certificates in support of the averment that the deceased was their father, and a certificate of marriage demonstrating that the deceased and their mother solemnized their marriage on 14th January 2006.

7. At the hearing, one Loise Ng'endo Waiyaki, a sister to the deceased, testified on behalf of the appellants as PW1. She said that the respondents and their mother did not live with the deceased but only visited from time to time, and that the respondents were aged about 13 and 16 respectively when their mother married the deceased in 1998. She also testified that the deceased had, during his lifetime, gifted one of his properties to his nephew known as Timothy Lawrence Waiyaki.

8. Samuel Karanja Waiyaki, a brother to the deceased, testified as PW2. His testimony was that the deceased was never married but cohabited with the respondents' mother. He however conceded that they conducted a church ceremony, after which they were issued with a marriage certificate. He proposed that the two assets registered in the deceased's name be given to Loise Ng'endo Waiyaki for having taken care of the deceased during his illness.

9. The 1st appellant also testified as PW3, and although he conceded that the deceased had married the respondents' mother, he stated that the two did not have any children together.

10. On his part, Joseph Makimei Mwaura, a cousin of the deceased, testified as PW4. The gist of his testimony was that the deceased had told him that Loise Ng'endo Waiyaki had been taking care of him, and since he did not have money to repay her, he had proposed that a piece of his land be given to her, and if she declined, the same be given to her son.

11. On their part, the two respondents testified that the deceased married their mother under Kikuyu customary law in 1998 and thereafter solemnized their marriage in 2006; that prior to the events of 1998, they used to live with their mother elsewhere; that when their mother died, her remains were interred at the deceased's property and thereafter they continued to live with the deceased on his property. They stated that they were children of the deceased; that the deceased accepted and recognized them as his children, and therefore being the only children of the deceased, they were entitled to apply for letters of administration to his estate in priority to the appellants.

12. Vide judgment dated 29th September 2017, the trial court held that the determination of the application depended on the outcome of the question whether the respondents were children of the deceased. The salient findings of the trial court were that the respondents were the deceased's children as per the meaning ascribed to a child and/or children under the provisions of section 3(2) of the *Law of Succession Act*; that no evidence was led by the appellants to discredit the evidence in the form of birth certificates which named the deceased as the respondents' father; that the respondents were named in the funeral program of the deceased as his children; and that they were entitled to take out letters of administration of his estate.

13. Regarding the allegation that the respondents were married and hence not entitled to be administrators and or beneficiaries of the deceased's estate, the trial court held that there was no evidence that the respondents were married, and, in any event, there is no law that forbids a married daughter from inheriting the estate of her deceased parents.

14. As regards the argument that the deceased's land was ancestral and ought not to pass to non-biological relatives of the deceased's father, the trial court held that this was not in consonance with the *Law of Succession Act*, and that in any case, there was no evidence that the deceased held the said land in trust or on behalf of his siblings.

15. Other findings of the trial court were, inter alia that: no evidence was tendered to support the argument that the deceased had given one of the parcels of land to his nephew as a gift inter vivos; and whether the siblings of the deceased had been disclosed or not in the succession cause initiated by the respondents would not have made any difference, for the persons ultimately entitled to a share of the estate were the respondents, the surviving children of the deceased.

16. Dissatisfied with the decision of the trial court, the appellants preferred this appeal. They contended that the learned judge erred in law and in fact by inter alia: grossly misdirecting himself in his interpretation of children entitled to benefit from the deceased's estate vis-à-vis the *Law of Succession Act*; holding that the respondents were children of the deceased; failing to invoke section 39(1) of the *Law of Succession Act* and rule 7 of the *Probate and Administration Rules* and to apply the same standard to provide for the appellants as dependents of the deceased; failing to consider and evaluate fully or at all the effect and import to the Succession Cause, the Kikuyu customary law and rites; failing to appreciate and hold that the deceased's title to the property in dispute having been issued a few days after the demise of the deceased and having been issued as a consequence of the Succession Cause to the father's estate, the same should have reverted to the father's estate; and finding that the respondents were the only persons entitled to apply for administration of the estate of deceased's estate and be the beneficiaries thereof, excluding the appellants and the deceased's other siblings.

17. At the hearing hereof, learned counsel Mr. Nzuva appeared for the appellants. There was no appearance on behalf of the respondents, despite service of a hearing notice upon them. Mr. Nzuva relied on his written submissions without any oral highlights.

18. In their written submissions, the appellants reiterated that the respondents were not born during the subsistence of the marriage between the deceased and the respondents' mother and therefore they were not biological children of the deceased but his step-children. They faulted the learned judge for relying heavily on the provisions of section 3 (2) of the *Law of Succession Act* to determine whether the respondents were children of the deceased. They contended that paternity was not an issue before the trial court and that the respondents, being children whom the deceased had accepted as his own or for whom he voluntarily assumed permanent responsibility, could only qualify as dependents of the deceased under section 29 (b) of the *Law of Succession Act*.

19. In addition, that it was on this basis that they (the appellants) had included the respondents as step children in Succession Cause No. 1596 of 2010. The appellants contended that the respondents are not persons entitled to apply for letters of administration of the deceased's estate, and that section 39 of the Act specifies the persons entitled in the order of priority to inherit the estate of a deceased person. Further, that the said section does not mention step children. They cited this Court's decision in *Ngengi Muigai & another v Peter Nyoike Muigai & 4 others* [2018] eKLR, where the Court held that:

> "... a child as defined under section 3 (2) of *LSA*, that is to say, a biological child as well as any child whom a man 'has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility' shall be an automatic dependent under section 29 (a)..."

20. As regards the birth certificates produced before the trial court, the appellants contended that Section 12 of the *Births and Deaths Registration Act* contemplates entries in the register upon the joint request of the father and mother, and that in this case, the birth certificate produced in respect of the 1st respondent was obtained in the year 2007, long after her birth in 1985, and it is therefore obvious that it is the 1st respondent who supplied the information contained therein as her mother had passed on. They further submitted that the birth certificate and the identity cards did not afford them the right to apply for letters of administration of the deceased's estate.

21. Regarding applicability of Kikuyu customary law to the current discourse, the appellants submitted that the learned judge erred by making a finding to the effect that Kikuyu customary law was expressly ousted by the coming into force of the *Law of Succession Act*; that the *Judicature Act* which falls under 'any other written laws' envisaged under section 3(2) of the *Law of Succession Act* states that African customary law is applicable in civil cases where it is not repugnant to justice and morality, and not inconsistent with any written law and the *Constitution*.

22. The appellants posited that under the Kikuyu customary law inheritance is patrilineal as set out in the Restatement of African Law Kenya by Eugene Cotran; and that under the Kikuyu customary law, biological daughters are entitled to share a deceased's estate if they remain unmarried. With regard to the land forming part of the deceased's estate, they contended that it was ancestral land and that the appellants' families are all settled next to each other. According to the appellants, the 1st respondent is married and the probability of the 2nd respondent marrying is not in doubt, and the land may end up in the hands of strangers, hence disrupting the family set up.

23. On their part, the respondents contended in their written submissions that as per the provisions of section 3 (2) of the *Law of Succession Act*, they are children of the deceased even if they were not his biological children; that the deceased had married their mother and that he expressly recognized and accepted them as his children and assumed responsibility over them; that the deceased accommodated them in his home, educated them and that even after their mother's death, they continued to live with the deceased in his home; and that their birth certificates and national identity cards bear the name of the deceased as their father. They argued that they are therefore children of the deceased by virtue of section 3 (2) of the *Law of Succession Act*.

24. As to whether the appellants were dependents of the deceased, the respondents said they were not, because the deceased had surviving children who are catered for under Section 3 (2) and 29 of the *Law of succession Act*; that since the deceased was not survived by a spouse, the provisions of section 38 of the *Law of Succession Act* comes into play, which allows the estate to be divided equally between the respondents as the surviving children of the deceased; and that since the appellants were not depending

on the deceased at the time of his death, they cannot be provided for under sections 26 and 39 of the *Law of Succession Act*.

25. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

26. We have carefully perused the record of appeal, the rival written submissions and considered the relevant law. The issues for determination in this appeal are: whether the respondents are children of the deceased for purposes of the law of succession and whether they were entitled to apply for letters of administration of the deceased's estate; whether the land belonging to the deceased was ancestral land which he held in trust for his siblings; and whether the deceased had gifted his nephew one of his properties before his death.

27. In determining the first issue, the starting point is the definition of 'child' or 'children' under the *Law of Succession Act*. Section 3(2) of the said *Act* stipulates as follows:

> "(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility." [Emphasis added]

28. It is common ground that the deceased and the respondents' mother entered into a union sometime in 1998 after their traditional marriage, which union was solemnized on 14th January 2006 under the now repealed African Christian Marriage and Divorce Act. The respondents contended that after the said traditional marriage, together with their deceased mother, they lived with the deceased till his demise.

29. We agree with the learned judge that under the *Act*, it is easy to determine whether a person is a child of a deceased person. At paragraph 16 of the impugned judgement, the learned judge stated thus:

> "Whether or not a person is a child of a deceased person is a matter that can be resolved in several ways. One is where the child is born within wedlock. In such case there is a presumption that the couple in wedlock was the child's biological parents. Where it turns out later that the said parents were incapable of having children, then, if the infertile parent is female there would be a presumption of adoption; and if male a presumption of adoption or that the female parent begat the child with another but the male partner assumed parental responsibility. Where the child was born outside wedlock and thereafter her mother married and moved in together with the child, it is presumed that the man formally adopted the child and assumed parental responsibility."

30. It is an indisputable fact that Jackline and Caroline were not born within wedlock. Their deceased mother and the deceased began living together in 1998. As of the year 1998, Caroline and Jackline were aged 16 and 13 respectively. It is therefore evident that both respondents were born before the year 1998 when their deceased father took in their mother as his wife. However, Caroline testified before the trial court that the deceased used to visit her mother at her house years before he took her in as his wife. This statement was not challenged at the hearing before the trial court. On this basis therefore,

we agree with the views expressed by the trial court that there is a possibility that the deceased had sired the respondents before taking in their mother as his wife.

31. The respondents produced before the trial court copies of their birth certificates and national identity cards to demonstrate that indeed the deceased was their father. We have seen in the record a copy of a birth certificate which bears an entry No:1302779/07. It is issued in the name of Jackline Wangari and it is indicated that she was born on 10th February 1982 to Florence Wamuyu Gitonga and Gidraph Kamau Waiyaki. The said birth certificate was issued on 9th August 2007. That evidence was not controverted by the appellants. In the absence of concrete evidence to the contrary, the allegation that the respondents' birth certificates were obtained close to the deceased's date of death bears no legal import and is not sufficient to challenge their validity and/or authenticity.

32. From the evidence on record, we are satisfied that the deceased's name was entered in the register as the father of the respondents, either at the joint request of the deceased and the respondents, or after the registrar was satisfied with the evidence tendered regarding their relationship. No contrary evidence was proffered by the appellants.

33. Another piece of evidence adduced before the trial court to show the relationship between the deceased and the respondents is a copy of the deceased's funeral programme. Although the funeral programme was written in the native language of Kikuyu, which all the parties herein associate and are familiar with, the trial court was able to translate the relevant parts thereof to English. The said translation was not challenged by the appellants. In the funeral programme, the deceased was said to have married the respondents' mother in the year 1998 and the marriage was solemnized in the year 2005. The respondents were cited and recognized as children of deceased. The appellants, who testified that they participated in the deceased's traditional funeral ceremony, did not object to the respondents being included in the funeral programme as children of the deceased.

34. The evidence that was adduced before the trial court clearly showed that the respondents were children of the deceased. It matters not that they were born out of wedlock. The deceased expressly recognized and accepted them as his children and voluntarily assumed permanent responsibility over them. Therefore, for all intents and purposes, the respondents were children of the deceased within the meaning ascribed thereto under section 3 (2) of the *Law of Succession Act*.

35. Section 66 of the *Law of Succession Act* sets out the order of preference in applying for letters of administration. It provides in part as follows:

> " When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—
>
> a. surviving spouse or spouses, with or without association of other beneficiaries;
>
> b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
>
> c. the Public Trustee; and

d. creditors:

> Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

36. Our reading and interpretation of section 66 as read together with Part V of *Law of Succession Act* is that the person given priority over an intestate is the surviving spouse and children. In this case, since the deceased's spouse was not alive, the respondents, whom the deceased had recognized and accepted as his children, had priority to petition the court for letters of administration. The appellants, who are siblings of the deceased, did not rank in priority to the respondents. Further, and without proof by the appellants of their dependency on the deceased prior to his death, the respondents were, pursuant to the provisions of section 38 of the *Law of Succession Act*, entitled to the net intestate estate of the deceased in equal share in their capacity as his only surviving children. We are alive to the fact that the *Law of Succession Act* at Section 29 does not classify children on the basis of gender or marital status. It does not discriminate between married or unmarried daughters of a deceased person when it comes to the distribution of his estate.

37. As to whether the land registered in the deceased's name was ancestral and held in trust on behalf of his siblings, we find no basis for agreeing with this argument. For starters, it is trite law that the onus lies on a party who relies on the existence of a trust to prove it. The law never implies nor presumes a trust, save in the case of absolute necessity. See *Juletabi African Adventure Limited and another v. Christopher Michael Lockley* [2017] eKLR. The appellants did not lead evidence to show that the deceased held any land in trust for them.

38. Secondly, evidence was led to show that when the deceased's father died, succession proceedings were commenced *vide* Nairobi HCSC No. 1350 of 2004. The appellants and their other siblings, including the deceased, each got a share of their father's estate. The deceased got 0.60 acres of Muguga/ Gitaru/290, which share later translated into Muguga/ Gitaru/ 2379 and 2386. This was the deceased's rightful share out of his father's estate which was available for distribution to his legal dependents upon his demise. By claiming that the deceased held the properties in trust for his siblings, the appellants are merely seeking to illegally and unfairly deprive the respondents of their rightful share of his estate.

39. Lastly, on the issue that during his lifetime the deceased had gifted one of his assets to Timothy Lawrence Waiyaki, the son of Loise Ngendo Waiyaki, (PW1), we agree with the findings of the trial court that no evidence of the alleged inter vivos gift was placed before the trial court. The requirements of law as regards a gift inter vivos is that it 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 a 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. See the holding of Nyamweya, J. (as she then was), in *In re Estate of The Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR. Therefore, nothing turns on this issue.

40. From the foregoing, we find no reason to interfere with the findings by the trial court. Consequently, we dismiss the appeal with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.