Kowalczyk v Kolii (Civil Appeal E004 of 2021)
[2023] KECA 1224 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1224 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E004 OF 2021

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

OCTOBER 6, 2023

BETWEEN

THOMAS KOWALCZYK .... APPELLANT

AND

AGNES SILANTOI KOLII .... RESPONDENT

(Being an appeal from the Ruling of the Hon Lady Justice M. Thande delivered on 17th January, 2020 in Mombasa High Court Succession Cause No. 34 of 2015)

JUDGMENT

1. The dispute the subject of this appeal revolves around the Estate of Peter Walter Kowalczyk (Deceased) who died intestate on March 10, 2013 leaving a will executed on July 16, 2009 in which he appointed his wife Agnes Silantoi Kolii, the respondent herein as the sole executrix. By that will, the deceased bequeathed all his estate to the respondent to the exclusion of his only son, the appellant herein. On February 12, 2015 the respondent petitioned for a grant of probate of written will which petition was duly gazetted on December 31, 2015 and a grant of probate issued to the respondent (petitioner/executrix) on June 30, 2016. Subsequently, vide a summons for confirmation of a grant dated March 7, 2017, the respondent applied for confirmation of the grant.

2. However, on March 21, 2019, the appellant filed a chamber summons dated March 20, 2019 seeking that such reasonable provisions be made for the appellant as a son and dependant of the deceased out of the deceased's net estate as the court thinks fit; that an order be made directing the respondent to provide to the Court statement of accounts in respect of the deceased's proceeds held at the deceased's account held at Barclays Bank Limited, Equity Bank, Pension Scheme in Germany as at the time of his death to enable the Court ascertain the nature and value of the estate of the deceased; and that the costs of the application be provided for.

3. That application was based on the grounds that in spite of the appellant being his only child, the deceased made no provision for the appellant; that the decision not to bequeath the estate to the appellant was based on the fact that the appellant falsified transfer documents in respect of title No Kwale/Diani Complex/354 (the Plot) which reduced the deceased's share therein; that the appellant denied that he ever intended to defraud his father; that the plot was purchased by Petra Kowalczyk (Petra), the appellant's mother and the deceased's former wife together with the deceased; that sometime in 1994 when the appellant and Petra appeared before the Land Control Board, they were informed that as foreigners, they could not be registered as the owners of the plot in the absence of a Kenya citizen; that after informing the deceased who was then in Germany, it was agreed that their caretaker, Kazungu Kitsao (Kazungu) be included as the 3rd owner of the Plot; that the appellant then signed the transfer on behalf of his father and the title was issued in the 3 names; and that in a judgment in HCCC No 346 of 1998 filed by Petra against the deceased, the Court ruled that the name of Kazungu be removed from the title.

4. The respondent, in response to the application, took a preliminary objection dated May 31, 2019 and swore a replying affidavit on June 17, 2019. In the preliminary objection, the respondent stated that the affidavit in support of the application though deposed to in Bonn- Germany was commissioned in Kenya. In the replying affidavit, the respondent while admitting that the appellant is a son of the deceased, averred that there is no love lost between the deceased and the appellant. The respondent denied that the deceased left anything in the banks and that he was a pensioner and had an account in Germany where she had not gone since his demise.

5. The respondent averred that the appellant, his mother and Kazungu had tried to oust the deceased from ownership of the plot; that the Court found that the appellant had acted illegally; that this is the reason the deceased decided not to give anything to the appellant; that the appellant is of age and is capable of acquiring his own property; and that the appellant has no locus standi to challenge the probate.

6. In her ruling delivered on January 17, 2020, the learned Judge of the High Court (Thande, J) dismissed the preliminary objection on the ground that it was premised on wrong facts. She however dismissed the appellant's application and found that the appellant being the biological son of the deceased was a dependant within the meaning of section 29(a) of the *Law of Succession Act* (hereinafter referred to as the Act) hence needed not prove his dependency; that section 27 of the Act, gives the Court a wide discretion to provide for a dependant not otherwise provided for; that section 28 enjoins the Court in making an order under section 27 of the Act to have regard to certain circumstances; and that appellant was not challenging the validity of the will of the deceased nor the testamentary capacity of the deceased to make the will; that the appellant only challenged the exercise by the deceased of his testamentary freedom to exclude him from his estate; and that from the contents of the will the exclusion of the appellant was quite deliberate

7. According to the learned Judge, one of the factors that the Court is to consider in an application for provision by a dependant of a deceased person not provided for is the reason for exclusion as far as can be ascertained; that the reason for exclusion of the appellant was the finding by the Court in HCCC No 346 of 1998 that the appellant participated in the connivance of his mother and Kazungu and impersonated the deceased resulting in the reduction of the deceased's share in the Plot from half to a third; that the Applicant made no attempts to explain to his father the circumstances he disclosed in the application and made any attempt to make things right with his father; that the appellant's attempt to explain to the Court what he ought to have explained to his father prior to his demise was not helpful to his case; that the conduct of the appellant in relation to the deceased and the appellant's engagement in an illegality led to his being excluded from the Will; and that by dint of sections 28(e) & (g) of the *Law of Succession Act* the Appellant would not be eligible for reasonable provision of the deceased's estate.

8. Based on the foregoing, the learned Judge held that given the circumstances, redistributing the estate of the deceased as requested by the applicant would be tantamount to rewriting his will; that the Court will only intervene where a qualified dependant under section 29 of the Act satisfies the Court that he has been unreasonably excluded or deprived of reasonable provision; that there were valid reasons by the deceased to exclude the appellant and that the deceased had the testamentary freedom to will away his property as he pleased; that it was not for the Court to readjust the bequests at the bidding of the applicant since inheritance is a privilege; that the appellant had not in his affidavit stated what he was doing for a living, what his existing and future needs were or his past, present or future capital or income received or expected to be received from any source.

9. In the learned Judge's holding, even assuming the deceased had not stated the reasons for excluding the appellant, without stating his present and future needs as well as any received or anticipated capital or income, it would have been difficult for the court to make a finding in favour of the appellant. The learned Judge therefore found that based on facts and the law, the appellant had not placed any material before the court to warrant the exercise of discretion in his favour to grant the orders sought.

10. It was this decision that precipitated this appeal.

11. We heard this appeal on this court's virtual platform on May 22, 2023 at which learned counsel Mrs Nafula appeared for the appellant and informed us that she had filed her submissions which she briefly highlighted. Though served there was no appearance for the respondent though submissions had been filed on behalf of the respondent.

12. According to the appellant, the learned judge found, without evidence, that the appellant had not explained himself to the deceased notwithstanding the fact that the appellant did so during the hearing of HCCC No 346 of 1998; that the learned judge misdirected herself on the provisions of section 27 of the act when she interpreted it to mean that she could not readjust the bequests and that the deceased had the testamentary freedom to will away his property as he wished; that the court, with no evidence at all or only choosing to rely on the respondent's evidence, came to the conclusion that the deceased and the appellant had a strained relationship and that this entitled the deceased to exclude him from his will; that even if there was love lost between the appellant and the deceased, this does not warrant the appellant's exclusion from the will as a beneficiary of the deceased; and that contrary to the finding by the learned judge, the respondent as the administrator of the estate of the deceased was under a duty to provide a complete valuation of the estate of the deceased and in particular, the monies held in the bank accounts listed as his assets before any other action can be taken.

13. On behalf of the respondent, it was submitted that the learned judge's finding that that by dint of sections 28(e) and (g) of the act the appellant was not eligible for reasonable provision of the deceased's estate there was supported by evidence; and that the learned judge was right in finding that the appellant essentially failed to disclose or lay any material before court disclosing any of his past, present or future capital or income from any source and also failed to disclose his existing and future means and needs to enable the Court to make any sensible order. We were urged to find that the learned Judge reached the correct decision in the impugned ruling and find this appeal to be without merit and dismiss it entirely with orders as to costs to the respondent.

Analysis and determination

14. We have considered the written and oral submissions by counsel and the authorities cited.

15. This being the first appeal, in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

> "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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, the 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."

16. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties. The Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

17. Section 26 of the *Law of Succession Act* provides as follows:

> Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

18. In this case it is clear that the appellant, being the son of the deceased fell under section 29(a) of the *Law of Succession Act* and therefore did not have to prove dependency on the deceased as the law presumed his dependency. However, the decision whether or not to make an order for reasonable provision is an exercise of discretion since as provided in section 27 of the Act:

> In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

19. In making an order under section 27 aforesaid, section 28 thereof enjoins the Court to have regard to the following:

    a. The nature and amount of the deceased's property;

    b. Any past, present or future capital or income from any source of the dependant;

    c. The existing and future means and needs of the dependant;

d. Whether the deceased had made any advancement or other gift to the dependant during his lifetime;

e. The conduct of the dependant in relation to the deceased;

f. The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;

g. The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

20. In deciding whether or not this Court should interfere with the discretion of the learned Judge, we make reference to the decision of the Supreme Court in the case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR in which it was held that:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:
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> > 'In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (l) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

21. It was therefore held by this Court in *Price & Another v Hilder* [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. The Supreme Court of Uganda, in *Kiriisa v Attorney-General and Another* [1990-1994] EA 258 held that it is settled law that the discretion must be exercised judiciously and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously. As to what the term "discretion" connote the Court stated that:

> " Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances."

22. It is clear that one of the considerations that the court takes in determining an application for reasonable provision is the conduct of the dependant in relation to the deceased as well as the testator's reasons for not making provision for the dependant. In this case, the deceased expressly disclosed in his will the reason for the exclusion of the appellant from benefiting from his estate. according to the deceased:

> " ...my son, Thomas Kowalczyk did not have the right to get a legal portion of anything from my values after my death (which is part of German Law) because he is doing the signing of false documents in favour of Petra and Kazungu which ends in a fake title deed which is reducing my 50% ownership for 33% or " in favour of my separated wife Petra and Kazungu and Thomas has no written authority to sign in my name (Judgment 23 July 2009)."

23. This view is supported by the finding of the Court in *HCCC No 346 of 1998* that:

> " the 1st Plaintiff Petra Kowalczyk and Kazungu Kitsao connived and presented Thomas Kowalczyk to impersonate the 1st defendant Peter Kowalczyk when they appeared before the land registrar."

24. According to the deceased, as a result of this connivance, his share in the property was reduced from 50% to one third. We agree with the learned judge that in those circumstances, the deceased had valid reasons for excluding the appellant from benefiting from his estate. He had a right to do so. In those circumstances, redistributing the estate of the deceased as sought by the appellant would be tantamount to rewriting the deceased's will without any justification.

25. Apart from that the learned Judge found, rightly in our view, that the Appellant had not in his affidavit stated what he was doing for a living; what his existing and future needs were; his past, present or future capital or income he had received or expected to receive from any source and therefore failed to satisfy the requirements of Section 28 of the *Law of Succession Act*. In this appeal,the Appellant has not addressed that finding by the earned Judge.

26. We agree with the opinion in *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR that:

> "…under the provisions of section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime."

27. In this case the Appellant apart from proving dependency, a status which the law presumed in his favour, he ought to have gone further to prove the factors enumerated in section 28 of the *Law of Succession Act*. In our view, there is no reason to interfere with the exercise of discretion by the learned judge. We are not satisfied that an error of law or principle was committed. To the contrary, the learned judge addressed herself well on the law. She took into account of relevant consideration and her decision cannot be faulted.

28. In the premises we find no merit in this appeal which we hereby dismiss but with no order as to costs, this dispute being a family dispute and this Court is enjoined to promote alternative dispute resolution mechanisms including reconciliation.

29. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR