



REPUBLIC OF KENYA



KENYA LAW
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**JGN v DKN (Civil Appeal 162A of 2018)
[2023] KECA 1463 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1463 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 162A OF 2018
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
NOVEMBER 24, 2023**

BETWEEN

JGN APPELLANT

AND

DKN RESPONDENT

(Being an Appeal from the judgment and decree of the High Court of Kenya at Meru (F. Gikonyo, J.) dated 10th July 2018 in Succession Cause No. 368 of 2008)

JUDGMENT

1. The deceased, MNM died intestate on 29th July 2008. He left a widow, JGN (the appellant) and the following children:-
 - a. DMN;
 - b. DKN (the respondent);
 - c. JKN;
 - d. FKN (minor);
 - e. PKN;
 - f. EMN (minor); and
 - g. BKN (minor).

His estate comprised a bank account at Cooperative Bank and another at Barclays Bank; two motor vehicles; and the following parcels of land: LR No. Kibirichia/Ntumburi/xxx; LR No. Kiirua/Naari/xxxx; LR No. Nyaki/Kithoka/xxxx, Plot No. T/xxx at Makutano and Plot No. Ntima/Igoki/xxxx at Makutano.



2. The appellant was on 19th February 2009 issued a grant of letters of administration intestate in respect of the estate of the deceased. On 29th April 2009 she applied for the confirmation of the grant. The respondent, JKN, FKN and PKN provided each a consent to the distribution of the estate. A certificate of confirmation was issued on 6th May 2009 in which the appellant got 2/3 of the proceeds of the two accounts, and 1/3 of the proceeds were to go to be deposited into an interest account for the benefit of the three minor children. The appellant was to use the proceeds from Barclays Bank to buy ½ acre land and construction timber for DMN. She got the two motor vehicles. 3 ½ acres of LR No. Kibirichia/Ntumburi/xxx, LR No. Kiirua/Naari/xxx, LR No. Nyaki/Kithoka/xxxx and the two plots were to be registered in her name to hold in trust for the respondent, JKN, FKN, PKN, DMN, EMN and BKN .
3. On 17th January 2017 the High Court (F. Gikonyo, J) appointed the respondent as a co-administratrix of the estate for the purpose of the continuing trust. This followed the summons dated 5th August 2015 by the respondent who had sought the revocation of the grant and, in the alternative, the termination of the trust held by the appellant for the benefit of the respondent in parcels LR No. Kibirichia/Ntumburi/xxx, Kiirua/Naari/xxx, LR No. Nyagi/Kithoka/xxxx, LR No. Makutano T/xxxx and LR No. Makutano Ntima/Igoki/xxxx so that she could get her share therein. Her complaint was that she was a beneficiary to the estate, being the appellant’s step- daughter, but that the appellant had not been diligent in the administration of the estate; had denied her access to the estate; and had denied her an opportunity to economically benefit from the estate. She stated that the appellant had evicted her from the estate premises and her child had been chased from school for lack of fees and the appellant had declined to offer her financial assistance to pay the same.
4. The appellant opposed the application and denied that she had not allowed the respondent access to the estate. She stated that she had given the respondent all financial support, and that the respondent had upon marriage moved out of the estate. She stated that she did not hold the estate for her personal benefit but for the rest of the children, and that the little income that the estate was generating was going towards educating and maintaining the younger children of the deceased. Lastly, she stated that the respondent had given her consent to the manner in which the estate had been distributed.
5. The court had asked the appellant to render accounts, which she did. No reason was found to revoke the grant, which, in any case, was now being jointly administered. On the question of the termination of the trust, the court noted that the appellant seemed to have assigned the objects of the trust strictly to benefit her children to the exclusion of the respondent. The Court pointed out that the respondent and the appellant’s children each had an equal benefit and claim to the properties subject of the trust. It was found that the respondent had not been treated equally with the other children in relation to the estate, and that the respondent had not received any economic benefit from the estate. Finally, the court directed that the respondent shall receive a distinct share out of each of the properties of the estate; she was going to have unlimited access to the estate; and that the two joint administratrices were to provide a full and accurate inventory of the estate, as the respondent also provided an independent inventory to enable the realization of the above orders.
6. On 13th July 2017 a rectified certificate of confirmation was issued to reflect the above ruling.
7. The appellant filed a summons dated 14th February 2018 under sections 35 and 47 of the [Law of Succession Act](#) (the Act) and Rule 73 of the [Probate and Administration Rules](#) seeking the rectification of an error in the face of the certificate of confirmation issued on 13th July 2017; an order directing the District Surveyor, Meru Central to undertake an independent subdivision of the deceased’s estate in accordance with the grant; a review of the confirmed grant to provide her with her benefit in the estate as none had been provided to her; and, in the alternative, the court to revoke and annul the entire grant and distribution to enable her present her claim of entitlement. Her case was that there was an



error in the grant as she had been appointed as a trustee for her children without a specific share for herself, being the only widow of the deceased who was legally entitled to benefit from the estate of the deceased. She contended that she had been disinherited in respect of her husband's estate. She stated that, of her children only BKN was a minor. The rest were adults. If each was given his/her benefit, she was going to be left landless and destitute without any benefit from the estate. Her other claim was that parcel LR No. Makutano Ntima/Igoki/xxxx was her matrimonial home where she was living and yet the respondent was threatening to evict her from there; that the respondent had brought a surveyor to subdivide the estate without reference to her. Lastly, that the grant had ordered her to provide for DMN in all parcels of the estate when the original grant had indicated that he was entitled to a share in only LR No. Kibirichia/Ntumburi/xxx and not in the other parcels as she had been ordered to buy him ½ acre and to construct a house for him.

8. The respondent opposed the application which she called a circus because the appellant was simply unwilling to transfer to the beneficiaries their rightful shares. She swore that the appellant was privy to the proceedings that had led to the confirmation of the grant and the certificate issued on 29th April 2009 in which she was appointed a trustee. The respondent deponed that, following the ruling of 20th March 2017, the appellant had filed a notice of appeal dated 23rd March 2017; that the court was therefore functus officio. Further, that according to section 35 of the *Act*, all that the appellant was entitled to were personal and household effects of the deceased and a life interest in the whole residue of the intestate estate all of which she had got in the estate as she had all along been administering the entire estate. She refuted the claim that LR No. Makutano Ntima/Igoki/xxxx was the appellant's matrimonial home. According to her, the plot consisted of rental shops and night rooms that generate income which the appellant was solely enjoying from.
9. The learned Judge allowed the request for the rectification of the grant on the basis that the certification of confirmation was at variance with the order of the court to the extent that whereas DMN had in the certificate been provided for in all the parcels of land, the order was that the appellant buys him half an acre of land from the proceeds of Barclays Bank account. The learned Judge declined to grant the request for the revocation of the grant or the redistribution of the estate to give her distinct benefit. It held that, although the existing jurisprudence was that it would be unconstitutional to limit a widow's entitlement to the estate of her deceased husband to only personal and household effects and to a life interest in the residue of the intestate estate, in this case the appellant had appealed to this Court and therefore she was going to have an opportunity to seek her remedy at that level.
10. These are the orders that aggrieved the appellant and made her to come to this Court in the present appeal. Her grievances were contained in the Memorandum of Appeal dated 13th September 2018, whose grounds were as follows:-
 - “ 1) That the learned Judge in the superior court erred in law and facts in dismissing the appellant's chamber summons dated 14th February 2018 on the grounds that the court lacked jurisdiction when indeed the court has all the powers bestowed upon it by dint of section 47 of the *Law of Succession Act*.
 2. That the learned Judge in the superior court erred in law and facts in failing to appreciate and order or review the distribution of the estate and recognize the appellant who is a widow to the deceased as one unit to be entitled to the estate and ended up denying the appellant any entitlement to her husband's estate.
 3. That the learned Judge in the superior court erred in law and facts by disregarding the provisions of section 35 of the *Law of Succession Act* and



declaring the appellant a mere trustee of her husband's estate on behalf of the deceased's children but without any specific share or entitlement as of right.

2. That the learned Judge in the superior court erred in law and facts by dismissing the appellant's application which sought to protect her right and entitlement of her late husband's estate meaning she lost even the entitlement of her matrimonial home.
 3. That the learned Judge in the superior court erred in law and facts by relying on non-existent technicalities to dismiss the appellant's plea.
 4. That the learned Judge's ruling dated 10th July 2018 is against the weighty matter raised which needed redress and intervention by the court."
11. During the hearing of the appeal learned counsel Mr. Carl Peters Mbaabu appeared for the appellant and learned counsel Mr. Ashaba appeared for the respondent. Each counsel had filed written submissions which they were allowed to highlight.
12. Learned counsel for the respondent did on 7th July 2023 file a supplementary record of appeal which, as a preliminary issue, learned counsel for the appellant objected to. Subsequently, however, he withdrew the objection and the appeal proceeded on its merits.
13. It was the argument by the learned counsel for the appellant that the learned Judge was wrong when he found that he had no jurisdiction under section 35 and 47 of the Act and Rule 73 of the Probate and Administration Rules to review the certificate of confirmation to be able to give the appellant a distinct share in the estate of the deceased. He submitted that, as a result of the denial of jurisdiction, the appellant was going to be disinherited once her children had, upon reaching the age of majority, taken their respective shares once the trust had been terminated. We were referred to the decision in Elizabeth Wanjiru Njonjo Rubia -v- Brian Mwaituria [2019]eKLR where it had been held that a widow was entitled to a distinct share from the estate of her late husband.
14. In response, learned counsel for the respondent supported the decision by the learned Judge. He submitted that the certificate of confirmation was the result of an application by the respondent which was supported by the consent of all the parties to the cause. Since she had not shown that her consent was either forged or fraudulently obtained, it bound her; and, therefore, the learned Judge had correctly found that he had no jurisdiction to review the certificate as the court had become functus officio.
15. This is a first appeal. It is our duty to reconsider the evidence tendered before the High Court, evaluate it ourselves and draw our own conclusions thereon. In doing so, we have to bear in mind that we did not see or hear the witnesses, an advantage that the High Court had (Selle & Another -v- Associated Motor Boat Co. Ltd & Others [1968]EA 123). We can only differ from the finding of the High Court if it was based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding that he did (Ephantus Mwangi & Another v- Wambugu [1983 - 84]2 KCA 100).
16. We have anxiously reviewed the record of what transpired in the High Court that led to the certificate of confirmation. The appellant, being the widow of the deceased, petitioned and obtained a grant of letters of administration intestate. She applied to have the grant confirmed. She swore an affidavit in support indicating the beneficiaries of the deceased, and also the property comprising the estate. In the affidavit, she proposed how she wanted the estate to be shared. She annexed the consent of the deceased's children who supported the proposed distribution. The High Court looked at the proposal and consent. It decided to distribute the estate on basis of the said proposal and consent. In effect, the distribution was by consent. The consequent certificate of confirmation followed this consent. The



law is that a consent order entered into by the parties is binding on them and cannot be set aside or varied unless it is demonstrated that it was obtained by fraud or misrepresentation or by agreement contrary to the policy of the court or where the consent was given without sufficient material facts (see *Flora N. Wasike –v- Destino Wamboko* [1988] eKLR). The consent became a contract that bound the appellant and the respondent.

17. We are aware that, despite the provisions of the *Act* that a widow in an intestate succession gets only a life interest, the obtaining jurisprudence is that the court, sharing the estate of a deceased who has left a surviving spouse, has to consider the equality of gender under the Constitution, and also consider the rights of the spouse in relation to property acquired during the marriage when dealing with the provisions of section 35 of the *Act*. The court has to pay attention to section 7 of the Sixth Schedule of the *Constitution*, and interpret the section in accordance with the relevant Articles of the *Constitution*. This jurisprudence was evident in *Stephen Gitonga M’Murithi –v- Faith Ngira Murithi* [2015]eKLR, for instance.
18. However, in the instant case the appellant bound herself to a life interest in the deceased’s estate when she consented to the distribution. By that consent, each of the other beneficiaries acquired rights in the respective properties and was entitled to consent to any surrender of such rights, which did not happen here. The application was not even addressed to all the beneficiaries.
19. Consequently, we find that there was no error on the part of the learned Judge when he found that he was functus officio in so far as he was being asked to review the certificate of confirmation to redistribute the deceased’s estate in order to give the appellant a distinct and tangible entitlement.
20. The result is that we find no merit in the appeal. We dismiss it with costs.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

