Ochanji & 7 others v Ochanji & 4 others (Civil Appeal 81 of 2018)
[2023] KECA 1411 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1411 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 81 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

NOVEMBER 24, 2023

BETWEEN

JANE ADHIAMBO MITO OCHANJI ..... 1ST APPELLANT

BENARD ODHIAMBO OCHANJI ..... 2ND APPELLANT

CLARY AWUOR OCHANJI ..... 3RD APPELLANT

MERCY AWINO OCHANJI ..... 4TH APPELLANT

CATHERINE NYANGI OCHANJI ..... 5TH APPELLANT

KEVIN ERASTUS OCHANJI ..... 6TH APPELLANT

BENJAMIN MITO OCHANJI ..... 7TH APPELLANT

VINCENT OKOTH OCHANJI ..... 8TH APPELLANT

AND

MARGARET ALOO OCHANJI ..... 1ST RESPONDENT

CLEOPHUS OCHANJI BUOLO ..... 2ND RESPONDENT

CHARLES OMONDI OCHANJI ..... 3RD RESPONDENT

JOHN OKOTH OCHANJI ..... 4TH RESPONDENT

DANIEL NYAGILO OCHANJI ..... 5TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Kisumu by Majanja, J. and delivered by Ochieng, J. on 31st May 2018 in HC Succession Cause No. 139 of 2006)

JUDGMENT

Judgment of Kiage, JA

1. By this appeal the appellant challenges the decision of the High Court at Kisumu made by Majanja, J. and delivered by Ochieng, J. (as he then was) on 31st May 2018, respecting the estate of Sylvester Ezra Markus Ochanji (deceased). The court decreed as follows;

    1. That the Summons for Revocation of Grant dated 23rd January 2006 is hereby dismissed.

    2. That the Grant of Probate dated 17th February 2005 is hereby confirmed in terms of the deceased's will.

    3. That there shall be no orders as to costs."

2. That decision emanated from the appellants' summons for revocation or annulment of grant dated 23rd January 2006 where, they sought an order that the grant of probate to Margaret Ochanji, the 1st respondent, be revoked and/or annulled. The grounds for the summons were, in summary, that the will upon which the grant was obtained, was a forgery by the 1st respondent to defraud other heirs of their rightful share to the estate; it did not meet the requirements of a proper written will; it was not properly attested and the contents thereof have never been read to all the heirs; it did not bequeath all the estate of the deceased, and it disinherited the appellants. It was further pleaded that, the executrix of the will (the 1st respondent) was the major beneficiary of the will thereby presenting a conflict of interest; the executrix failed to proceed diligently with the administration of the estate and to provide to court a full and accurate inventory of all the assets and liabilities of the deceased, and all the dealings therewith.

3. In a supporting affidavit sworn by the 1st appellant, Jane Adhiambo Mito, on 23rd January 2006, it is averred that the deceased expired on 11th March 2004 and a grant of probate was made to the 1st respondent on 17th February 2005. It is alleged that the grant was obtained by the making of false statements or by concealment from the court of something material to the case. The 1st appellant explains that she is one of the 3 widows of the deceased with whom she had seven children, the 2nd to 8th appellants. She narrates that some time after the death of her husband, she was informed by the law firm of M/s Ogutu Mboya & Company Advocates that her deceased husband had left a written will with them and that they were intent on unveiling its contents to the 3 widows and the executrix on the 3rd of April 2004. On the said date she proceeded to the law firm but Mr. Ogutu Mboya declined to unveil the contents of the will in the absence of the other widows. The 1st appellant claims that she later learnt that the grant of probate had been issued to the 1st respondent through an application which was made without her knowledge and that of her 7 children who are beneficiaries of the deceased. Moreover, her three daughters, the 3rd to 5th appellants, were not provided for under the will. The affidavit further explains in detail the controversy between the parties herein. In reply to the summons, the 1st respondent, and the eldest widow to the deceased (Judith Akinyi Ochanji) swore affidavits on 31st May 2006 in which they denied the appellants' claims. They deposed that after the deceased's departure, they came to learn that he had left a will in the custody of the law firm of Ogutu Mboya & Company Advocates. It was alleged that there was a sour relationship between the appellants and the deceased during his lifetime which may have occasioned the will being framed to their disadvantage.

4. On 25th September 2006, by consent, Mwera, J. ordered that the hearing of the summons proceeds by viva voce evidence. In a long protracted hearing before several judges, the 1st appellant (PW1), and

her daughter the 4th appellant (PW2), gave evidence on behalf of the appellants. The 1st respondent (DW1), the first and only child from the deceased's first house and Killion Obuolo Were (DW2), a nephew to the deceased and a witness to the will, testified in response. The 2nd to 5th respondents who are children to the deceased's 2nd wife were not party to the proceedings before the High Court.

5. For the appellants, evidence was adduced that the grant issued to the 1st respondent was based on a forged will. The contents of the will were challenged on various grounds including that, the deceased's name 'Sylvester' was misspelt; the pieces of land mentioned in paragraphs 5 to 8 of the will were not properly described; three of the appellants were not bequeathed anything in the will; the 1st appellant's three sons were only bequeathed land but not any money-generating asset; some properties, including three vehicles and a property in South C estate were left out of the will; the deceased could not have possibly made his daughter-in-law and his nephew to be witnesses of the will when they were only between 20 and 25 years of age; the will was only signed on the last page when it should have been signed and dated on each page. Further, the signature on the will was not that of the deceased.

6. The appellants contested the 1st respondent being a major beneficiary in the will yet she was the administratrix. They dismissed the allegation that some of them did not benefit under the will because they had a bitter relationship with the deceased. It was contended that the court issued two grants, that is, letters of administration intestate and a grant of probate. The appellants claimed that when the will was signed, the deceased was unwell suffering from diabetes.

7. In response, the 1st respondent testified that she was the administratrix of the deceased's estate. By the time the deceased passed on, he was estranged from the 1st appellant and had commenced divorce proceedings being SRM Case No. 45 of 2002. He, however, passed away before the matter had been fixed for hearing. The 1st respondent explained that Ogutu Mboya & Company Advocates wrote a letter inviting members of the three houses for the opening of the will but the appellants failed to attend. According to the will, the 1st respondent and the two widows from the first and second house were appointed as executors. However, the two widows allowed the 1st respondent to proceed as executrix. To the 1st respondent, when the will was executed in August 2003, the deceased was not sick. Further, the property in South C which was not in the will had already been transferred to her by the deceased as a gift.

8. The 1st respondent clarified that initially the court issued a grant of letters of administration intestate but when her advocate noticed that the wrong grant had been issued, he returned it and was issued with the correct grant of probate. It was submitted that on realizing that some of the appellants had been left out of the will, the three houses tried to reach a settlement by selling some of the property allocated to the second house and paying the appellants the proceeds of the sale. The 1st respondent claimed that the appellants received approximately Kshs.4.9 million. DW2 testified that sometime in August 2003, the deceased approached him with one Janet Atieno Ochanji, his wife, and asked them to sign a document in which he claimed to have distributed his property. DW2 stated that the deceased was in good health at the time.

9. The evidence was taken by four judges ending with Majanja, J. who, upon considering the competing positions, wrote a ruling holding that the deceased's will was valid. He, in the result, dismissed the summons for revocation of grant dated 23rd January 2006 and confirmed the grant of probate dated 17th February 2005. Ochieng, J. (as he then was) delivered the judgment.

10. Dissatisfied with that decision, the appellants filed the instant appeal raising 12 grounds, later condensed in the written submissions to 3 grounds which we summarise as that the learned judge erred by;

1. Dismissing the summons for revocation of grant and confirming the respondent's grant of probate.

2. Failing to appreciate that there were two competing letters of administration.

3. Acting on wrong principles in arriving at his finding.

11. During the hearing, Mr. Bruce Odeny appeared for the appellants, while Mr. Moses Orengo appeared for the 1st respondent. It was apparent that despite efforts being made to serve counsel on record for the 2nd to 5th respondents, and the 2nd respondent in person, there was no appearance for them. Both the appellants and the 1st respondent had filed written submissions and counsel highlighted the same.

12. Mr. Odeny submitted that the will in question was not the will of the deceased but a mere afterthought. He contended that the proceedings that commenced the succession cause indicated that the deceased died intestate and a grant to that effect was issued. Counsel argued that the will was only introduced later when the appellants got to know of the succession proceedings in court. In any case, he added, the will had errors that made it inauthentic. It was submitted that the will was not signed by the deceased nor witnessed by two competent witnesses; it misspelt the names of the deceased's children and, included properties that did not belong to the deceased, while omitting those that actually belonged to him.

13. Mr. Odeny contended that despite court summons, only one of the persons who witnessed the deceased sign the will attended court, while the other one refused to attend. The witness who turned up indicated during cross-examination that he never saw the deceased sign the will: he was only given a document to sign. It was further asserted that no probable explanation was given as to why the 3 daughters from the third house were left out of the will, yet they were beneficiaries of the estate of the deceased.

14. Counsel argued that at the time the petition for probate was filed by the 1st respondent, the 6th and 8th appellants were minors, and pursuant to sections 58, 71(2)(a) and 84 of the *Law of Succession Act* (LSA), there ought to have been appointed more than one administrator to be trustees of the minors' beneficial interest in the deceased's estate. Counsel thus faulted the learned judge for failing to find that the grant was obtained fraudulently by the making of a false statement or the concealment of a material fact as provided under section 76 of the *LSA*.

15. It was argued that the will started from page 2 instead of page 1, further raising doubts as to its authenticity. To counsel, since the validity of the will was in question, then the administration and distribution of the deceased's estate ought to have been intestate and in that respect, all the 3 widows ranked in priority to take out letters of administration of the deceased's estate in accordance with section 66 of the *Act*. Counsel further urged that the court should have made reasonable provision out of the deceased's estate for the 3 children who were disinherited in the will, pursuant to section 26 of the *LSA*. In the end, we were urged to allow the appeal to the extent that, the grant issued to the 1st respondent be revoked; the 3 widows be made joint administrators of the estate of the deceased; the 1st respondent to file an account of the estate of the deceased before the High Court within a specified time frame, and the estate be distributed afresh.

16. Opposing the appeal, Mr. Orengo submitted that in a bid to reach a settlement between the parties herein, the 1st respondent gave the third house part of her property; the second house also sold part of its property and gave them some money. With regard to the validity of the will, counsel contended that the 1st appellant was asked by the trial court if the signature on the will was that of the deceased and her response was 'it looks like it but I am not sure'. The court then directed her to lead expert

evidence on the same but she failed to do so. On the claim that the will was forged, counsel submitted that no evidence was adduced to show that the 1st respondent committed any forgery. He asserted that the 1st respondent was not present when the will was prepared or executed. She only got it from Ogutu Mboya & Company Advocates after the petition had been lodged in court. Moreover, the appellants did not show how, in the sequence of events, the 1st respondent forged the will. Citing section 109 of the *Evidence Act*, counsel urged that the burden of proving forgery lay on the appellants. He added that the typographical errors alluded to did not invalidate the will as long as the intention of the testator could be discerned.

17. Mr. Orengo disputed the appellant's claim that the will was a mere after thought. He explained that the petition which was filed on 8th October 2004 was for grant of probate and the will was annexed. However, when the registry staff were preparing the notice for gazettement, an error was made. Instead of advertising the succession cause as one with a will, it was advertised as one without. Subsequently, when the grant was issued on 12th February 2005, it was for an intestate succession. Counsel submitted that the grant for an intestate succession was returned by the 1st respondent's advocate and a proper grant of probate was issued on 17th February 2005. He asserted that the learned trial judge appreciated the very fact that there was a mistake which was later rectified.

18. Concerning the complaint that three of the appellants were excluded from the will, it was argued that the fact that a dependant has been precluded from a will does not invalidate a will as the deceased has testamentary freedom under section 5 of the *LSA*. Besides, it was contended, the first and second house had made provision for the 3rd, 4th and 5th appellants, who were not bequeathed any property in the will. Mr. Orengo concurred with the trial court's finding that the fact that the appellants had accepted the settlement offered by the first and second house, was an acknowledgement that there was a will left by the deceased which did not favour them. As to the contention that some pages of the will were missing, counsel's response was that the appellants had deliberately left out some pages. In the end, we were implored to find that the appeal lacks merit and dismiss it.

19. I have carefully considered those rival submissions by counsel in keeping with our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation although we allow for not having seen and heard the witnesses in testimony, so as to arrive at our own independent conclusions. See Rule 31(1) of the *Court of Appeal Rules*, 2022; *Selle Vs. Associated Motor Boat Co.* [1968] EA 123).

20. It is apparent that the main contention here is the validity of the will, upon which the grant for probate was issued. The appellants challenge it on various grounds as already captured herein. As to whether what the court granted was a grant of probate or letters of administration intestate or both, I note and agree with the trial court's finding that there was an error in the notice that advertised the succession proceedings, which indicated the proceedings as intestate, but the same was not prejudicial to the parties herein. The learned judge observed;

> "The petition was advertised in Gazette Notice No. 9156 dated 13th October 2004. Although the notice advertised the proceedings as intestate proceedings, I do not find any prejudice occasioned to the parties. A grant of probate was issued to the petitioner on 17th February 2005."

21. It is also evident from the record that the petition that was filed was one for probate with an attached written will. Thus, the outcome would have been solely a grant for probate and I am satisfied that this was the case. I am also persuaded, as was the learned judge, that the deceased had testamentary capacity to prepare and execute the will, DW2 having testified that when the deceased took the will to him and

one Janet to attest, he was in good health. I am minded that though it was alleged that the deceased was sick to the extent that his testamentary capacity may have been affected, the appellants failed to demonstrate, as it was their duty to, that the illness impaired his mind and understanding. Moreover, the allegation made by PW1 that the signature on the will may not have been that of the deceased was not proved. She failed to lead expert evidence to demonstrate that the signature was forged as claimed. To the contrary, her testimony appeared to tacitly accept the signature as genuinely the deceased's.

22. The appellants are further aggrieved by the fact that the deceased did not bequeath any property to three of them, being daughters from the third house. I observe that the 1st respondent lead uncontroverted evidence to the effect that, considering that the third house was disadvantaged in the will, the second house sold some of its property and gave them proceeds of that sale in a bid to reach a settlement. The 1st respondent also testified that she was willing to relinquish part of the property allotted to her for the benefit of the third house. Indeed, the learned judge recognised this verity and surmised that, in any event, the fact that some of the appellants were left out in the will did not invalidate it as; a testator has the right to exercise his testamentary freedom. I concur with the learned judge's sentiments. I further adopt this Court's holding in *John Wagura Ikiki & 7 Others Vs. Lee Gachigia Muthoga* [2019] eKLR where we observed;

> It was within this very exercise of testamentary freedom that the deceased elected to leave out his sons, John Wagura and Joseph Ndungu Ikiki, and in the same breath, bequeathed the lion's share of his estate to his 3rd wife for reasons that were personal to himself. He was under no obligation to give any reasons for so doing...We agree with Mr. Mugambi's assertion that it would have been more prudent for the disinherited sons to raise objections against the deceased's will by filing proceedings for adequate provision under section 26 of the Act which instead of attempting to invalidate the will or to subordinate it to the dictates of Kikuyu customary law."

23. All said, I see no reason for faulting the learned judge for dismissing the summons for revocation of grant and confirming the grant of probate dated 17th February 2005.

24. I find this appeal devoid of merit and would dismiss it but with no order as to costs.

25. As Mumbi Ngugi and Tuiyott, JJ.A are of the same view, it is so ordered.

Judgment of Mumbi Ngugi, JA

26. I have had the benefit of reading in draft the judgment of my brother, O. Kiage, JA. which I entirely agree with and have nothing useful to add.

Judgment of Tuiyott, JA

27. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

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

O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR