



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OKWENGU, KIAGE & SICHALE, J.J.A.)

BETWEEN

ELIUD MWENDIA WANDI.....APPELLANT

AND

JANE MUTHONI MUCHIRA.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kerugoya (Limo, J.) dated 29th September, 2015

in

Succession Cause No. 175 of 2015)

JUDGMENT OF THE COURT

[1] The dispute leading to this appeal arises out of the estate of Magu Mwenje Alias Peter Wandu Mwenje (deceased) who died intestate on 17th May, 1998. The estate of the deceased comprises one parcel of land namely Kabare/Mutige/20 (**suit property**) measuring 1.2 ha or thereabout.

[2] Annah Wanjiku Wandu (Annah), now deceased applied to the Principal Magistrate's Court in Kerugoya in Succession Cause No. 228 of 1998 for a grant of letters of administration to the estate of the deceased whom she claimed was her husband with whom she had six children. Jane Muthoni Muchira (Jane) filed objection proceedings and also petitioned for a grant of letters of administration to the estate of the deceased as a dependant and beneficiary by virtue of being the deceased's second wife. Jane claimed that she and her four children were dependants of the estate of the deceased. Upon hearing the objection proceedings, the Principal Magistrate's court (Kiriba SRM) found that Jane was a second wife of the deceased and ordered that both Annah and Jane be appointed as administrators of the estate of the deceased.

[3] On 23rd May 2005 Jane applied for confirmation of the grant and proposed that the suit property be shared equally amongst the two houses and each widow to hold the respective shares for their houses. Before the grant was confirmed, Annah died. Her son Eliud Mwendia Wandu (Eliud), then filed a protest in the Magistrate's Court disputing the status of Jane as a wife and proposing that the estate be shared equally between himself and his 3 brothers. Upon hearing the protest, the magistrate (Onyiego SRM) (as he then was) delivered a judgment on 30th May 2007 in which he found that Jane was married to the deceased under customary law, and that her children were dependants of the deceased. The Hon magistrate directed that the grant be confirmed with the estate being shared out according to the number of children in the two houses of Anna and Jane, with the surviving spouse being an additional unit.

[4] Eliud who was dissatisfied with the judgment of the Magistrate's Court, lodged an appeal in the High Court in which he challenged the finding, that the deceased was married to both Annah and Jane. Eliud also claimed that the proceedings for confirmation of the grant were a nullity as he was not properly substituted in place of Annah.

[5] In his judgment, the High Court (**Muchelule, J**) referred to the ruling of Kiriba SRM and the finding that he had made that both Jane and Annah were wives of the deceased and noted:

“Annah did not challenge these findings. She did not appeal against the decision of the court. The issue whether or not Jane was the wife of the deceased for the purpose of succession proceedings and whether her family could benefit from the estate have been decided and bind the parties.

The appellant's position was that his father left only one wife, his mother. This issue was settled by the court hearing application for the grant of letters of application”.

[6] In addition, the learned Judge found that Eliud had not been properly appointed as the legal representative of Annah's estate, and therefore the proceedings before Onyiengo SRM relating to the confirmation of the grant and distribution of the estate, were a nullity. The learned Judge therefore set aside the decision of the magistrate's court (Onyiengo SRM) and ordered for a retrial in regard to the confirmation of the grant, after the appointment of a legal representative of the estate of Annah.

[7] For some reasons which we are not able to decipher from the record of appeal, the matter does not appear to have gone back to the lower court for retrial as order by Muchelule J. Instead, by a Summons for Confirmation of Grant dated 8th February 2013, filed in the High Court at Kerugoya, Succession Cause No. 175 of 2012, Jane sought to have the grant confirmed and the estate of the deceased distributed amongst Annah's six children and her five children, each having 0.11 hectares except her two sons Kelvin Wanjohi Muchira and Evans Muchira who were each to have 0.16 hectares as they were to provide for her.

[8] Subsequently, Eliud was substituted in place of Annah and a grant issued jointly to Eliud and Jane. Jane then filed summons for confirmation of the grant of letters of administration with Eliud as her co-administrator, to which Eliud then filed an affidavit of protest against the confirmation of the grant. In his affidavit Eliud maintained that it was the deceased's wish that the suit property be distributed equally between Eliud and his three brothers. The summons and confirmation of grant were heard in the High Court at Kerugoya (**Limo, J**) by way of affidavit evidence and written submissions. This resulted in the judgment of the High Court, now subject of this appeal.

[9] In his judgment, the learned Judge disposed of the issue of the status of Jane as follows:

***“The proceedings show that the petitioner being dissatisfied by the decision of the lower court moved to the High Court by Civil Appeal No. 81 of 2008 but the Honourable Court in Embu overruled the petitioner and held that both Annah Wanjiku Wandi and Jane Muthoni Muchira were wives to the deceased and dependants as held by the lower court.*”**

...

However the issue of whether Jane Muthoni Wachira was a wife and dependant to the deceased has since been determined as indicated above. I do agree with the petitioners learned counsel Beth Ndorongo that the law recognizes that the petitioner and her children because the deceased recognizes the children as his own and voluntarily assumed permanent responsibility in accordance with section 3(2) of the Law of Succession Act Cap 160.”

[10] The learned Judge found that the issue whether Jane was a wife to the deceased was settled in both the magistrate's court and in Embu High Court, and that Jane was indeed a wife to the deceased; that the children of both Annah and Jane were dependants of the deceased within the meaning of section 29 of the Law of Succession Act. The learned Judge confirmed the grant and distributed the estate equally between all the beneficiaries, that is, Annah's six children and Jane's five children, and added Jane as a surviving spouse.

[11] Eliud is aggrieved by this judgment and has lodged a memorandum of appeal raising 6 grounds. In brief, Eliud faults the trial Judge for failing to consider the issue of whether the respondent was the deceased's wife and misapprehending the provisions of Section 29 of the Law of Succession Act, on whether the respondent's children were dependants of the deceased entitled to his estate.

[12] Eliud filed written submissions which were highlighted by his counsel, Mr. Abubakar. He faulted the learned Judge for failing to find that the respondent was not the deceased's wife; that Jane never presented any evidence in proof of the marriage. Eliud maintained that Jane was the deceased's sister in law, and that her assertion that she was inherited by the deceased as a wife was not proved.

[13] Eliud also contended that the learned Judge misapprehended the provisions of Section 29 of the Law of Succession Act; that there was no evidence even in the form of birth certificates proving that Jane's children were dependants of the deceased. Eliud faulted the learned Judge for naming Jane as a dependant of the estate of the deceased and including her in the mode of distribution, maintaining that even as a wife, she was only entitled to a life interest in the estate of the deceased. Finally, it was submitted that Annah should have been counted as an additional unit since she survived the deceased.

[14] Ms. Ndirango, learned counsel who appeared for Jane made oral submissions in which she claimed that Eliud's appeal was incompetent; that the mode of distribution was proper as Jane's children were proved to be dependants of the deceased; and that since Annah was deceased, the learned Judge was right in failing to consider her as a unit.

[15] In this appeal, the main issues raised by Eliud concerns the status of Jane as a wife of the deceased and the status of her children as dependants of the estate of the deceased. These two issues go hand in hand with the question of distribution of the deceased estate.

[16] We have carefully set out the background to this appeal, in order to clearly bring out the issues that were subject of the judgment under appeal. It is evident from the background that we have set out, that the issue as to whether Jane is a widow of the deceased entitled to a share of his estate, was settled by the trial magistrate (Kiriba, SRM) in Principal Magistrate's Court Succession Cause No. 228 of 1998, during the objection proceedings that were filed by Jane, with regard to the application by Annah, for grant of representation for the estate of the deceased. In that ruling, which to date has not been set aside, the magistrate's court (Kiriba SRM) found that Jane had proved that she was married to the deceased through customary law, and that her children were entitled to a share of his estate as dependants. This decision was never appealed against by Annah or anyone else. The issue of Jane's marriage to the deceased was therefore not an issue that was open for consideration by the High Court in Kerugoya.

[17] There is also an issue that was raised by Jane regarding the competence of this appeal, with regard to whether Eliud was granted leave to appeal against the judgment of the High Court.

The relevant law in this regard is **Section 50(1)** of the Succession Act which provides that: -

“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.”

[18] The protest filed by Eliud with respect to the application for confirmation of the grant was heard in the Magistrate’s Court (Onyiengo SRM) as the trial court. A decision was rendered and Eliud filed an appeal in the High Court against that decision. The High Court (Machelule, J) while sitting on this appeal held that the substitution of the appellant as a legal representative of the estate of Annah was irregular, and the proceedings before the trial court a nullity. The trial court therefore ordered for a re-trial. As already stated, the matter does not appear to have gone back to the lower court for retrial, but the High Court in hearing Jane’s summons for the confirmation of the grant acted in its original jurisdiction under the Law of Succession Act. The appeal before this Court is therefore against the judgment and decree of the High Court (Limo, J) in regard to the confirmation of the grant of the estate of the deceased, under the Succession Act, and not in exercise of the High Court’s appellate jurisdiction and Section 50 of the Law of Succession Act is not applicable.

[19] The issue of a right of appeal to the Court of Appeal from decisions of the High Court in matters under the Succession Act has been addressed severally by this Court. In **Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another** [2014] eKLR, the Court having addressed the differing views on this issue concluded that:

... under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes.

[20] We find that Eliud needed leave of the court, to file an appeal against the judgment of the High Court in Kerugoya Succession Cause No. 175 of 2012 rendered under the Law of Succession Act. No such leave was exhibited and therefore the appeal before us is incompetent and is accordingly struck out.

[21] This being a family dispute, we do not find it appropriate to make any orders as to costs. Each party shall therefore bear their own costs.

Dated and delivered at Nairobi this 5th day of February, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR