IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJ. A)

CIVIL APPEAL NO. 104 of 2017

BETWEEN

ROSE NAFULA WANYAMA.....APPELLANT

AND

NUSRA NASAMBU CHIBANGA.....1st RESPONDENT

AGATON WANYAMA alias MARK.....2nd RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma,

(S.N. Mukunya, J.) dated 6th May 2017

in

Bungoma ELC Case No. 129 of 2012)

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JUDGMENT OF THE COURT

1. The suit property in dispute is Land Parcel No. W.BUKUSU/ESIBOTI/264. At all material times, the property was registered in the name of Mr. Weyeye Chimbanga (deceased) who died in 1962.

2. The 1st respondent is the widow to the deceased. The 1st respondent and the deceased were blessed with one son Mr. Calistus Nyongesa Wanyama, who died on 24th March 1995. The appellant herein is the widow to Calistus Nyongesa Wanyama. It is not disputed that the said Calistus Nyongesa Wanyama is survived by the appellant and five children. The appellant is thus a daughter in law to the 1st respondent. The 2nd respondent is a biological son of the 1st respondent born in 1972 long after the deceased had died.

3. The witness statement of Mr. Joseph Wamalwa Khaemba indicated that the deceased died in 1962 leaving behind the late Calistus Nyongesa Wanyama as the only heir to his estate. That the 1st respondent got married to a one Mr. Cleophas Wele Chibanga and together they had two children namely the 2nd respondent and Mektilda Nekesa Wanyama.

4. Similarly the witness statement of Charles Furukha Wepekhulu indicates that the 1st respondent was a widow of Mr. Cleophas Wele Chibanga and the 2nd respondent was the second born of the said Cleophas Chibanga after Mektilda Nekesa Wanyama.

5. The foregoing was recapped by the witness statement of Chrispinus Simiyu Were, a step brother to the 2nd respondent and Mektilda Nekesa Wanyama. The late Cleophas Wele Chibanga was their father as the 1st respondent was his second wife. That the late Cleophas Wele Chibanga died in 2002 and left behind seven (7) acres of land, which they were willing to share with the 2nd respondent should he want a share of it.

6. The appellant filed suit against her mother in law (the 1st respondent) in a plaint dated 13th December 2012 claiming ownership of the suit property. In her plaint, the appellant contends that the deceased had only one son and heir namely the late Mr. Calistus Nyongesa Wanyama. That the said Calistas Wanyama being the only child of deceased was the sole heir of the suit property and indeed his estate. That the 1st

respondent as mother to the late Calistus Wanyama holds title to the suit property in trust for the estate of the late Calistus Wanyama and the beneficiaries of his estate. That the 1st respondent as widow of the deceased only has a life interest in the suit property.

7. The appellant contended that the 2nd respondent fraudulently exercised undue influence on the 1st respondent and caused her to secretly and fraudulently transfer the suit property to the 2nd respondent in total disregard to the fact that the late Calistus Nyongesa Wanyama was the sole and absolute heir to the suit property.

8. In the plaint, the appellant sought an order to compel the 1st respondent to transfer title to the suit property into the name of the appellant as the legal heir and personal representative of the estate of the late Calistus Nyongesa Wanyama.

9. In a joint statement of defence, the 1st respondent admitted being the holder of title to the suit property but denied holding the title on behalf of her deceased son Calistus Nyongesa Wanyama or any other person.

10. On his part, the 2nd respondent denied exerting any undue influence on the 1st respondent to transfer the suit property. The 2nd respondent conceded that the late Calistus Nyongesa Wanyama was the only son to the deceased. The 2nd respondent in his evidence stated that he was born in 1972, 10 years after the death of the deceased. However, he denied that the late Calistus Wanyama was the only heir and beneficiary of the estate of Weyeye Chibanga.

11. In her defence, the 1st respondent averred that as the absolute registered proprietor to the suit property, she had the right to possess, utilize and deal with the suit property in any manner she deemed fit. That the appellant had no interest in the property.

12. Upon hearing the parties, the trial court delivered a judgment dated 6th May 2017 dismissing the appellant's suit against the respondents. In dismissing the suit, the judge held as follows:

> *[9] There is absolutely no fraud proved before me and that claim is dismissed. Calistus Nyongesa Wanyama was not an only child, there was evidence from the plaintiff and the defendant that the 1st defendant and her deceased husband had three (3) children namely Calistus Nyongesa Wanyama; Nelikitsa Nekesa now married and Agerton Wanyama, the 2nd defendant herein. The argument that Agertom Wanyama was not a biological son of Weyeye Chimbanga (deceased) and therefore cannot inherit is completely misplaced. There was no evidence placed before me for such an allegation. To the contrary, it was proved that all along he lived with his mother all his younger days on the suit land. Then he moved to Nairobi for work. …. I find that the 2nd defendant is a son of Wayeye Chimbanga and is therefore the brother of the plaintiff's husband. He has an equal right to inherit as his deceased brother.*
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> *The 1st defendant herein is registered as absolute proprietor. She was so registered in 1975. She has every right to distribute her land as she wishes. In this case, she wishes to give the plaintiff and her five children five acres. I have no reason to disturb her distribution. In fact, I find it fair and reasonable. To the contrary, the plaintiff wants the entire land for herself and her children. That is unreasonable and unfair to the other beneficiaries. The end result is that this suit is dismissed. The caution lodged by the plaintiff in the suit land shall be removed forthwith by the Land Registrar and the transfer registered as per consent of the Land Control Board herein.*

13. Aggrieved by the dismissal of her suit, the appellant has filed the instant appeal citing the following grounds in the memorandum of appeal.

> (i) The judge erred by speculating that the 1st respondent was registered as the absolute owner of the suit land on the basis of a decision in a purported Kakamega Succession Cause which decision was never produced in court as evidence and the case number was never quoted.
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> (ii) The judge erred by speculating that the reason the 1st respondent was registered as an absolute owner of the land was because the appellant's husband was a minor at that time and was dependent on the 1st respondent.
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> (iii) The judge erred by ignoring the fact that when the late Weyeye Chimbanga died, he had only one minor child, Calistus Nyongesa Wanyama and therefore the 1st respondent could only have a life interest in the suit land.
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> (iv) The judge erred in failing to appreciate that the late Wayeye Chimbanga died in 1962 while the 2nd appellant was born in 1978 (sic) and so it was not possible that Wayeye Chimbanga sired the 2nd respondent.
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> (v) The judge erred in finding that the 2nd respondent is son to the late Wayeye Chimbanga and further erred in finding that the 1st respondent as the registered proprietor of the suit land was free to do anything with the land.
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> (vi) The judge erred by ordering that the transfer of the suit property be registered as per the consent of the Land Control Board yet the respondents had not filed a counterclaim.

14. At the hearing of this appeal, learned counsel, Mr. Emmanuel Kipkurui holding brief for Ms Wamalwa Advocate appeared for the appellant. Despite service of the hearing notice, neither the respondents nor their counsel appeared.

APPELLANT'S SUBMISSIONS

15. Counsel for the appellant urged that though no written submissions were filed in the appeal, counsel nevertheless opted to rely on the grounds of appeal set out in the memorandum of appeal and urged us to allow the appeal with costs.

RESPONDENTS' SUBMISSIONS

16. On record, the respondents neither appeared for hearing nor filed any submissions in the appeal.

ANALYSIS and DETERMINATION

17. We have considered the grounds of appeal and the record of appeal in their entirety. We have also taken into account the record of proceedings before the trial court as well as the evidence and submissions made by both parties during trial. This being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** it was expressed:

> *"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif -v - Ali Mohamed Sholan** **(1955), 22 E. A. C. A. 270**)."*

18. This appeal is unique in how it has been urged. Neither the appellant nor the respondents filed written submissions. Despite service of the hearing notice, the respondents nor their counsel appeared at the hearing. On the other hand, counsel for the appellant appeared and relied on the grounds of appeal as stated in the memorandum of appeal.

19. It behooves us to reiterate that grounds of appeal are mere allegations and remain so until proven otherwise. Notwithstanding, in the interest of substantive justice, it is opportune for us to delve into the merits of the appeal to determine if the grounds stated in the memorandum of appeal have merit.

20. One of the grounds urged is that the trial court erred in finding that the 2nd respondent was son to the deceased. We have examined the record of proceedings before the trial court. The record shows that the 1st respondent was wife to the deceased. It is not in dispute that the late Calistus Nyongesa Wanyama was son of the deceased. On record there is a witness statement that the 2nd respondent, Agaton Wanyama alias Mark, was sired by Mr. Cleophas Wele Chimbanga. In his own evidence, the 2nd respondent testified he was born in 1972 which is ten years after the death of the deceased.

21. A child born after nine months from the date of death of a spouse cannot be regarded as a dependant or beneficiary of the estate of the deceased. A posthumous child born after the death of a husband cannot inherit from the estate of the deceased unless such a child was in utero when the husband died. The child must be born within ten (10) lunar months after the husband's death to be entitled to an inheritance. **(See also Amen –vs- Astrue, 822 N. W. 2d 419 Nebraska)**

22. In **Re Estate of M'mboroki s/o Maraja (deceased), (2009) eKLR** it was stated: -

> *"That exclusion is in my opinion in order for a child born posthumously to a widow not less than nine months upon the death of the husband cannot be regarded as having survived the deceased and is therefore not entitled to inherit the net intestate estate." (*See also **In re Estate of the Late Wandimu Munyi (Deceased) eKLR – Keruguya Succession Cause No. 23 of 2013**).

23. From the evidence on record, we find that the learned judge erred in finding that the 2nd respondent was son of the deceased. The 2nd respondent was born long after the deceased had died. It follows that the 2nd respondent could not have been a dependant of the deceased. The fact that the 2nd respondent lived on the suit property in his younger days does not make him the son of the deceased. One does not become a son by living on a property. As to whether the 2nd respondent can be a beneficiary of the estate of the deceased, we find that as at the deceased's death in 1962, the 2nd respondent was not alive and cannot be a beneficiary of the estate of the deceased.

24. We have further analyzed the evidence on record on the issue of fraud. We agree with the trial judge that there was no evidence supporting any of the particulars of fraud as itemized in the plaint. In **Ndolo – v- Ndolo (2008) 1 KLR (G & F) 742** it was stated that, the standard of proof required in an allegation of fraud is obviously higher than that required in ordinary civil cases, and in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

25. In the instant matter, the particulars of fraud alleged in the plaint were that the 1st appellant transferred and registered the suit property in the name of the 2nd respondent. The evidence on record shows that the suit property has not been transferred to the name of the 2nd respondent. It follows the allegations of fraud were not proved.

26. The appellant urged that the trial court erred in arriving at its decision based on speculation. It was urged that the trial court speculated on the existence of a Kakamega Succession Cause when no evidence was tabled to show that indeed the 1st respondent was registered as proprietor of the suit proper after succession. That the judge erred in arriving at a speculative decision that the 1st respondent was registered as absolute proprietor of the suit property because the late Calistus Nyongesa Wanyama was a minor.

27. We have considered the ground of appeal averring speculation. It is trite that a court cannot base its decision on speculation. A court's decision must be founded on evidence and the law.

28. During hearing, the 1st respondent testified that she was registered as proprietor of the suit property on 9th July 1975 after filing a Succession Cause. Indeed, it is true that the impugned judgment in this matter does not refer to the Succession Cause Number. The legal question is whether the absence of the Succession Cause Number vitiates the judgment of the trial court. When the 1st respondent testified and stated that she became registered proprietor after a Kakamega Succession Cause, the issue of Succession Cause Number was never raised. The appellant was at liberty to cross-examine the 1st respondent and raise the issue. Further, the existence or non-existence of the Kakamega Succession Cause was not an issue for determination by the trial court.

29. In this matter, Calistus Nyongesa Wanyama survived his father the deceased. From the evidence on record, the 1st respondent and the late Calistus N. Wanyama were the only beneficiaries of the estate of the deceased.

30. As at 1962 when the deceased died, the 1st respondent could not have been given the entire estate of the deceased to the exclusion of Calistus Wanyama. We thus find that the registration of the 1st respondent as proprietor of the suit property was for the benefit of all the beneficiaries of the estate of the deceased.

31. We recognize that the Law of Succession Act came into operation in 1982. Under **section 2** of the Act, the Act only applies in respect of the estate of persons who died after its commencement. We also note that **section 99** of the Act repeals previous legislation governing succession. We note that the deceased was an African and under the provisions of the Law of Succession Act having died in 1962, the Succession Act does not apply to his estate. The succession of the estate of the deceased can only be done pursuant to the law of succession that existed in 1962.

32. Noting that the deceased had only two beneficiaries/dependants, we find and hold that the suit property is held in trust by the 1st respondent on behalf of the beneficiaries of the estate of Calistus Wanyama. We say so because the first respondent as widow of the deceased cannot absolutely own the property to the exclusion of Calistus Wanyama who survived the husband of the 1st respondent.

33. In conclusion, we find and hold that;

a) The 1st respondent holds in trust Land Parcel No. W.BUKUSU/ESIBOTI/264 for the benefit of the estate of the late Calistus Wanyama and his beneficiaries.

b) For the avoidance of doubt since the 2nd respondent is not a beneficiary of the estate of Weyeye Chimbanga, he is not entitled to benefit from it and should therefore desist from intermeddling with the suit property.

34. The upshot is that this appeal has merit and it succeeds. This being a family dispute, we order each party to bear his/her own costs of the appeal.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.