



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)**

**CIVIL APPEAL NO. 49 OF 2016**

**BETWEEN**

**SAMWEL KIPLAGAT BIWOTT KENDAGOR.....APPELLANT**

**AND**

**GRACE WANGOI NJOGU.....FIRST RESPONDENT**

**ELIZABETH WANGARI KARANJA.....SECOND RESPONDENT**

**JANE NYAMBURA KARANJA.....THIRD RESPONDENT**

**ANNE MWARA MUKIRAI.....FOURH RESPONDENT**

**RUTH WANJIKU MURAYA.....FIFTH RESPONDENT**

**ANN NJERI MUCHINA.....SIXTH RESPONDENT**

**ESTHER WANJIKU WAINAINA.....SEVENTH RESPONDENT**

**JOHN NDEGWA WAINAINA.....EIGHTH RESPONDENT**

*(Appeal from the ruling and order of the High Court of Kenya*

*at Kitale (S. Githinji, J.) dated 29<sup>th</sup> February, 2016*

**in**

**HC. SUCCESSION CAUSE NO. 159 OF 2014)**

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**JUDGMENT OF THE COURT**

[1] This appeal arises from a ruling that was delivered by the High Court (Githinji J), in a succession cause concerning the estate of the late **Naomi Njeri Muchina** (deceased). Following an application for grant of probate made by **Samwel Kiplagat Biwott Kendagor** (herein the appellant), as the executor of the Will of the deceased, the deceased's eight (8) children (herein respondents) filed an objection to the making of grant of probate of the deceased's Will.

[2] The respondents challenged the written Will said to have been made by the deceased, maintaining that it was a forgery; and that Joe Wainaina Maina (the deceased's grandson) to whom the deceased according to the Will, bequeathed her only property, a thirty five (35) acre parcel of land, known as LR. NO. 5572/7 (suit property), was not a dependant of the deceased, and had no special relationship with the deceased, to justify the bequest to the exclusion of the deceased's children and other genuine dependants. The respondents asserted that the deceased died intestate, and that her estate should be administered in accordance with the rules of intestacy.

[3] The hearing of the objection proceedings proceeded through affidavits sworn by the appellant and an affidavit sworn by one of the

deceased's daughters **Grace Wanjohi Njogu** (Grace). Among the documents that Grace annexed to her affidavit was a report prepared by a forensic fingerprints examiner, at the request of the respondents, in which report the document examiner, upon comparing the known thumbprint impression of the deceased, in her National Identity Card and Electors Card, with the thumbprint impression on the Will, found that the impressions contained significant dissimilarities and concluded that they were not of one and the same person.

[4] On his part, the appellant swore that he had known the family of the deceased for many years, and that prior to his death, the deceased's husband, one Joseph Wainaina Muchina, had bequeathed the suit property to the deceased. He maintained that the deceased made a Will, that was drawn and attested in accordance with the Law of Succession Act, and that she was of sound mind at the time she made the Will. He explained that his efforts to get the fingerprint impression made by the deceased on the Will, verified were frustrated when the Director of Criminal Investigations informed him that the fingerprint impression on the Will was found to be unsuitable for comparison.

[5] In his ruling, the learned judge found that the respondents had failed to establish that the Will was not made by the deceased; and that even though the deceased appeared to have disinherited her children, the possibility of the Will having been made by her, could not be ruled out. The learned judge however, applied **section 26, 27, 28 & 29** of the **Law of Succession Act**, to provide for the deceased's ten (10) children including the estate of two (2) of the children who were deceased; and further ordered that the suit property be shared out equally among the ten children.

[6] The appellant is aggrieved by that judgment. In his memorandum of appeal, he has raised four (4) grounds contending, *inter alia*, that the learned judge erred in hearing the objection that was filed out of time, without leave of the court being sought; in exercising his discretion to distribute the estate in equal shares; in disregarding the deceased's wishes as expressed in her last Will which the court found to be valid; and in exercising his discretion in distributing the deceased's estate in the absence of an application by or on behalf of the dependants; in wrongly exercising his discretion by not allowing the parties to adduce oral evidence in court which would have brought to light the reasons why the deceased bequeathed the estate to Joe Wainaina to the exclusion of the others.

[7] The respondents also filed a notice of cross appeal under **Rule 93** of the **Court of Appeal Rules**, seeking to have the decision made by the court varied or reversed to the extent that the learned judge erred in holding that the contested Will was valid; in disregarding and failing to consider all the evidence before the court challenging the validity of the Will; in failing to consider the respondent's evidence that the will was a forgery; in directing that the deceased property be shared among the deceased children equally without taking into account the share that Elijah Maina Wainaina had been previously allocated; and in not finding the appellant unsuitable to manage the estate of the deceased due to conflict of interest.

[8] In their cross appeal, the respondents sought orders that the Will dated 31<sup>st</sup> December, 2003 be declared invalid, null and void; that the estate of the deceased be administered intestate; that the petition for probate of written Will in the estate of the deceased be struck out with costs and that the appellant bears the costs of the appeal and cross appeal.

[9] We have considered this appeal, and the submissions made before us. It is apparent from the record of appeal, that the appellant petitioned for probate of the written Will on 4<sup>th</sup> July, 2014, an appropriate notice on the petition was published in the Kenya Gazette on 3<sup>rd</sup> October, 2014, and the respondents filed their objection to the making of the grant on 13<sup>th</sup> November, 2014.

[10] Under **section 68(1)** of the **Law of Succession Act**, a notice of any objection for a grant of probate is required to be lodged within the period specified by the notice of the lodging of the petition or such longer period as the court may allow. In Gazette Notice No. 7023 of 3<sup>rd</sup> October, 2014, through which the notice of the application for grant of probate was made, the period for raising any objection was indicated as thirty (30) days from 3<sup>rd</sup> October, 2014, which was the date of publication of the notice. This means that any objection ought to have been filed by 2<sup>nd</sup> November, 2014, and therefore the respondents' objection that was filed on 13<sup>th</sup> November, 2014 was filed eleven (11) days late.

[11] On 18<sup>th</sup> March, 2015, the appellant filed a notice of objection to the respondent's objection proceedings contending, that, the same were filed out of time. By an order made on the 8<sup>th</sup> June, 2015, it was directed by the court that the appellant's preliminary objection serve as a response to the objection proceedings. The court also gave directions that the hearing of the objection proceedings was to proceed by way of affidavit evidence.

[12] On 10<sup>th</sup> December, 2015, when the matter came for hearing, the appellant's advocate indicated that he wished to proceed by way of oral evidence, and that he be given time to call evidence. This was objected to by the respondent's counsel and the court delivered a ruling in which it rejected the application contending, that it had no merit and would only amount to an adjournment which would only delay the trial. Thereafter, the parties were forced to proceed with their arguments in support of the affidavit evidence in regard to the objection proceedings.

[13] Although the issue of expiry of time was raised, the learned judge does not appear to have addressed it in his ruling. This was an unfortunate omission on the part of the learned judge, as parties are entitled to have all the issues that they have raised addressed by the court. Be that as it may, the respondents filed their objection proceedings eleven (11) days late. That delay was not inordinate and, had an appropriate application been made, the court would not have had any difficulties extending time. Indeed, section 68(1) gives the court that latitude.

[12] **Rule 73** of the **Probate and Administration Rules**, also gives the court inherent powers to make such orders as it may be necessary for the ends of justice to be met. It is evident, that the respondents' advocate goofed in making the application outside the provided time, and in failing to apply for extension of time. However, this being a succession matter, it is in the interests of justice that the court determines the matter by applying substantial justice rather than procedural technicalities. For that reason, we shall deem the respondents objection as having been properly filed.

[14] As regards the procedure adopted by the court in hearing the parties on affidavit evidence, under **section 70** of the **Law of Succession Act**, the court has discretion to determine whether to call for any evidence or examine the applicants or any person. In this case, the court

had given directions for the matter to proceed by way of affidavit evidence about six (6) months prior to the date when the appellants sought to have the matter adjourned so that they could call witnesses for oral evidence to be taken. The learned judge considered their application, and rejected the application giving reasons for doing so. On our part, we find no reason to fault the learned judge in this regard.

[15] Under **section 11** of the **Law of Succession Act**:

*“No written Will shall be valid unless -*

*(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;*

*(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;*

*(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”*

[16] In this case, the Will was allegedly signed by the deceased through a thumbprint in the presence of two (2) witnesses, D.E.L. Fuchaka and Aggrey L. Kidiavai, both advocates. In his further affidavit sworn on 9<sup>th</sup> December, 2015, the appellant explained at paragraph 11 that the deceased had executed a Will whereby he was appointed as the executor of the Will and that a copy of the Will was given to one Wilson Njogu. The appellant does not state anywhere in that affidavit that he was present when the deceased made the Will. Nor was any affidavit sworn by Wilson Njogu who allegedly gave him a copy of the Will availed, nor was there any affidavit sworn by any of the two advocates who allegedly witnessed the signing of the Will.

[17] The respondents contended that the deceased never signed the Will. In her affidavit sworn in support of the objection proceedings, Grace, annexed a report from a document examiner who compared the thumbprint on the Will, with the known thumbprint of the deceased on her National Identity Card and Electors Card; and concluded that the fingerprint impression on the two sets of documents had marked differences and were not of one and the same person.

[18] On his part, the appellant annexed to his further affidavit a letter from Mr. Nzioka, of the Directorate of Criminal Investigations, Kitale, stating that the deceased Will was forwarded to the Registrar of persons for verification of her fingerprint impression but that the impression on the Will was found to be unsuitable for comparison. In light of the document examiners report and the letter from the Directorate of Criminal Investigations, Kitale, and in the absence of any affidavit from the two advocates who witnessed the signing of the deceased Will, it is evident that there was no evidence before the court to establish the requirement of **section 11(a)** of the **Law of Succession Act** with regard to the signing and attestation of the Will.

[19] In his ruling the learned judge did not direct himself to section 11 of the Law of Succession Act that deals with the validity of a Will, but misdirected himself by focusing on **section 5** of the **Law of Succession Act** that deals with capacity of a deceased person to make a Will. However, the issue was not the capacity of the deceased, but whether the deceased made the Will at all. There being no evidence before the learned judge, that the deceased signed the Will and that the same was attested, the learned judge was wrong in finding that the Will was valid. Consequently, the learned judge was wrong in distributing the estate.

[20] The upshot of the above, is that we dismiss the appeal and allow the appellants cross appeal, set aside the judgment of the High Court and substitute thereto an order declaring the Will dated 31<sup>st</sup> December, 2003, purported to be of the deceased, invalid, null and void and ordering the petition for grant of probate, of the written Will in the estate of the deceased filed on 4<sup>th</sup> July, 2014, struck out. As there is no evidence that the appellant is interested in the estate, and as the appeal and cross appeal arose from the errors committed by the lower court, it is just that no order as to costs should be made and we so order.

**DATED and delivered at Eldoret this 17<sup>th</sup> day of January, 2019**

**E. M. GITHINJI**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**