IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & SICHALE, JJ.A)

CIVIL APPEAL No 229 OF 2016

IN THE MATTER OF THE ESTATE OF HUDSON GITHAIGA GITHINJI

BETWEEN

ANNE WAMBUI GITHAIGA.....APPELLANT

AND

STEPHEN MAINA GITHAIGA.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Musyoka J.,) delivered on 8th day of November, 2013

in

Succession cause No 327 of 1994)

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JUDGMENT OF THE COURT

[1] In this appeal, ***Anne Wambui Githaiga*** (appellant) challenges the judgment of the High court in which the Judge found in favour of the prayers sought by ***Stephen Maina Githaiga*** (respondent). The trial Judge fastidiously summarized the facts of the case but in order to put this judgement in perspective, we will give a brief overview of the evidence and material that was before the trial court.

[2] ***Hudson Githaiga Githinji*** (deceased) died on 30th January, 1993 in Kerugoya. On 24th February, 1994 ***Jemimah Wambui Githaiga*** and the appellant applied for the letters of administration while describing themselves as the widow and daughter of the deceased respectively. In the petition they listed the survivors of the deceased as:-

1. Jemimah Wairimu Githaiga – widow.

2. Anne Wambui – daughter -32 years.

3. Maina Githaiga – son -20 years.

4. Keziah Njeri – daughter-19 years.

5. Ruth Nyacomba – mother-90 years.

6. SM – grandson- 11 years.

7. MW – grandson- 8 years.

8. HN – grandson- 14 years.

9. WK – grandson- 4 years.

It is significant to point out that the Maina Githaiga is the respondent and Keziah Njeri is his sister who were not included in the schedule of distribution when the grant was confirmed.

[3] Be that as it may, the grant of letters of administration intestate was issued to the appellant and her mother. The grant was finally confirmed in the sole name of the appellant and the deceased estate was to vest in her in trust of her children. This is what provoked the dispute that has escalated to the present appeal. On 4th July, 2002, **Stephen Maina Githaiga**, (respondent) filed an application seeking revocation of the said confirmed grant and the schedule of distribution that excluded his mother's house. He claimed that he was the son of the deceased and that he and his sister were left out in the schedule of distribution despite the fact that they were named in the petition for grant of letters of administration as the children of the deceased. The appellant on the other hand and her mother contested that the respondent and his sister were children of the deceased.

[4] To determine that dispute, the application for revocation was heard by way of affidavit and oral evidence. Upon considering and evaluating the evidence from both sides, the Judge was satisfied that the appellant and his sister ***Keziah Njeri*** were children of the deceased and they ought to have been provided for in the distribution of the estate of the deceased. The Judge specifically noted that there was a handwritten document on the record that was headed "consent letter" which bore the names of **Maina Githaiga**, (son), ***Keziah Njeri*** (daughter) *Ruth Nyachomba* (mother) and 4 grandsons namely, ***SM***, ***MW***, ***HN*** and ***WK***. The grant was subsequently confirmed on 4th March, 1998 and according to the application for the confirmation the names of ***Maina Githaiga*** and ***Keziah Njeri*** as son and daughter of the deceased respectively no longer featured.

[5] Although a copy of the said confirmed grant is not part of this record (it should have been part of this record of appeal) we have no reason to doubt what the trial Judge noted as irregular that the property of the deceased was to be registered in the name of an unnamed person to hold in trust in equal shares for her children. As regards the grand children, the Judge posited that the Law of Succession is clear that grandchildren are not entitled to a share of the estate of their grandfather when their own parents are alive. The Judge went on to reason there was no application under ***Section 26*** of the **Law of Succession Act** for the provision of dependency for the grandchildren in the event it was argued that they were dependants of the deceased. In conclusion,this is what the Judge ordered which is the subject of the instant appeal;

> ***"1. That Anne Wambui is confirmed as the surviving administrator.***
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> ***2. That Stephen Maina Githaiga is appointed as a co-administrator of the deceased and a grant of letters of administration intestate shall be issued to Stephen Maina Githaiga and Anne Wambui Githaiga.***
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> ***3. That the confirmation proceedings of 4th March 1998 are set aside and the certificate of confirmation dated 4th March 1998 is hereby cancelled.***
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> ***4. That the estate of Hudson Githaiga Githinji, deceased, shall be shared equally between his three surviving children Anne Wambui, Stephen Maina Githaiga and Keziah Njeri.***
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> ***5. That a certificate to confirmation of grant shall issue accordingly.***
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> ***6. That each party shall bear their own costs."***

[6] Aggrieved by the aforementioned orders, the appellant who is acting in person appealed by raising some 13 grounds of appeal that are rather repetitive and prolix. We will summarize them more or less the same way the appellant did in her written submissions. That is that the learned Judge erred in law and in fact; by admitting an undated consent letter allegedly commissioned by ***Lucy Njiru*** Advocate who denied any knowledge of it as the basis of the whole judgment; admitting a consent letter signed by the respondents only which was denied by the appellant; by failing to summon Hellen Warmarwa (alleged wife of deceased) who was alive and could testify on her relationship with the deceased; by presuming she was a wife and failing to consider the evidence adduced.

[7] During the plenary hearing, both the appellant and respondent appeared in person and each relied on their written submissions. In the written submissions, the appellant combined all her grounds emphasizing that the Judge erred by admitting an undated consent letter as the basis of the whole judgment and the authenticity of the said letter was suspect. Moreover the respondent testified that he was born in 1969 which means he was 24 years old when the deceased died while the said consent letter indicated he was 20 years when he signed it. It is from the said consent that the Judge inferred that the respondent and his sister were children of the deceased and according to the appellant it was not a valid consent.

[8] The appellant further faulted the Judge for what she termed as failure to analyse the evidence. In her view, the evidence adduced in rebuttal to the respondent's application for revocation was not taken into account. For example, the respondent stated that it was only his mother who could adduce cogent evidence about his parentage and yet the mother being a crucial witness was never called to testify. Although the respondents' witnesses claimed that the respondent's mother was married to the deceased through a kikuyu traditional ceremony, it fell short of proof of the key elements that constitutes a valid customary marriage. Lastly, the appellant contended that the Judge contradicted himself by stating that the affidavit evidence was false and at the same time relied on it especially the two affidavits sworn by ***Jemima Wairimu Githaiga***. To the appellant the said affidavits should have been struck out. She cited the case of **Richard Karimi Kinoti t/a Marry Happy Enterprises -v- Naomi K Githaka r/a Wagatumba Enterprises Nairobi Milimani HCCC No 2176 of 2000** where Ringera J., (as he then was) stated that an affidavit which is contradictory and appears to be false, has no probative value. The appellant urged us to allow the appeal.

[9] The respondent opposed the appeal, he too filed written submissions and made some oral highlights. He submitted that the present appeal

is meant to vex him and frustrate him as the appellant has continued to deny him his rightful share of his father's estate. Although he lives on the deceased's parcel of land, the appellant has denied him the portion of land allocated by the court and he is left to eke a living from a small portion of land that he cultivates. The respondent contended that the confirmed grant took into account only the first house that is represented by the appellant and her children. The respondent defended the impugned Ruling which he stated was in accordance with the evidence adduced and also ***Section 40 (1)*** of the **Law of Succession Act** which makes provision on how the estate of a polygamous household should be distributed. Thu, according to the respondent the deceased parcel of land known as Kiine/Ruiru/xxx should be shared equally between the two houses with the first house being represented by the appellant and the 2nd house by the respondent and his sister.

[10] We have considered the record, and deliberated on the submissions by the both parties as well as the law and the authorities cited. This being a first appeal as it has been held in numerous decisions of this Court, among them, the case of;

Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR this Court stated as follows regarding the duty of first appellate court:-

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-**
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> **"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."'**

[11] Bearing the above principles in mind, the germane issue that cuts across the entire appeal is whether the learned Judge erred by allowing the application for the revocation of the grant filed by the respondent. In other words,was there evidence to prove the respondent and his sister were children of the deceased. Before we delve into the merits of this appeal, we wish to point out that the appellant had also filed an application seeking review of the judgment that is the subject matter of this appeal. It is indicated that this appeal is from the judgment delivered on 8th November, 2013. What is irregular here is that there was an application filed by the appellant seeking a review of that judgment that was filed in the High court on 31st March, 2014 and was determined vide a Ruling dated 30th January, 2015. If the appellant had elected to file an application for review, then an appeal could not be filed against the same orders that were sought to be reviewed. In other words, the appellant lost her right to appeal against the judgment of 8th November, 2013 on filing an application for review.

[12] In the premises, filing an appeal against the same orders of 8th November, 2013 as the appellant did in this case was an abuse of the court process as the appeal could only lie as against the orders of 30th January, 2015. This is further compounded by the fact that the Notice of Appeal that is the anchor of the instant appeal was filed on the 9th February, 2015. The Notice of Appeal specifically states as follows;-

> **"TAKE NOTICE That the Petitioner herein Anne Wambui Githaiga being dissatisfied with the judgment dated 8th November, 2013 and ruling delivered on 29th January, 2015 by Honourable Justice W. M. Musyoka intends to appeal to the Court of Appeal against the whole of the said judgement and ruling" (emphasize provided)**

Firstly, the appellant could not appeal against the Judgment of 8th November, 2013 for reason that she had elected to file a review and therefore the appeal was not available. Secondly, time had lapsed and by the time this Notice of Appeal was being filed and there is no order exhibited to show that the appellant had sought the leave of the court to file a notice outside the time provided in the Rules. As matters lie there is no appeal before us and we order it struck out.

[13] Nonetheless, as parties appeared in person and we took time to analyse the merits of the matters raised in this appeal, we think it is prudent for us to deliver our findings on the merit of the appeal. In our view, this would also save judicial time and for all the parties to also appreciate how the entire appeal was disposed of on merit for purposes of having a total closure of the matters in dispute.

[14] On whether the Judge erred by revoking the grant, we find that even if the impugned consent letter was not considered there was sufficient evidence by the respondent and his three witnesses who gave evidence in support of his application for revocation of the grant. The respondent testified that he was the son of the deceased and his mother was ***Hellen Wamarwa***. Their mother left the deceased when he and his sister were young and in his case, he was in class 4 and he was brought up by his step mother, the mother of the appellant. He went away to look for work as a teenager, but when he returned his step mother showed him where to construct a house on the deceased parcel of land. He claimed that during the funeral of his father he and his sister were recognized in the eulogy of the deceased and they have been all along recognized by the deceased clan members.

[15] The same evidence was repeated by ***Stephen Githinji*** who testified that the deceased was his uncle and he knew the respondent and Keziah Njeri were the deceased children by his second wife. ***Peter Maina Stephen Githinji*** also testified and told the court that he was a brother of the deceased. He was emphatic that the deceased married ***Hellen Wamarwa*** as his second wife under customary law and dowry was paid. He said he was present at the said ceremony. It is noteworthy this witness was cross examined at length but he maintained his position. He went on to testify that the deceased and the 2nd wife gave birth to the respondent and his sister. That even during the burial of the deceased, the respondent and his sister were recognized as his children by the entire family. The 4th witness to testify on behalf of the respondent was ***Johnson Douglas Mwangi*** who collaborated the evidence by the other witnesses.

[16] To be contrasted with the evidence of these four witnesses was the sole evidence of the appellant; she testified that she was the only child of the deceased and she applied for the letters of administration with her late mother. She denied that her father had married a second wife or that the respondent and his sister were children of the deceased. According to her, the respondent came to their home in 1999 having been brought by clan elders and she did not know where he had come from. She contended that she and her children are the rightful heirs of the deceased because by the time he died he had built for her a house where he left her with her children who were also supported by the deceased.

[17] The learned trial Judge went through this evidence and although he stated that there was no need to analyse and evaluate it, the record spoke for itself as the appellant and her mother had recognized the respondent in the petition that they filed when they applied for the letters of administration. This is what the Judge posited which we entirely agree with;-

> ***"I do not need to analyse and evaluate the oral evidence adduced at the hearing of the revocation application. The answer lies not in those proceedings, but in the papers lodged in court on 24th February 1994 at the initiation of this cause. There is an affidavit sworn on 15th February 1994 by Jemima Wairimu Githaiga to support the petition for grant of letters. It lists Maina Githaiga, the applicant, and his sister, Keziah Njeri, as survivors of the deceased, being his son and daughter, respectively. There is also a consent letter, which is undated, but forms part of the court record and which is signed by Lucy Njiru, advocate for the respondents, which purports to be executed by the said Maina Githaiga and Keziah Njeri, as son and daughter, respectively, of the deceased. They are purported to have signed the said consents in those capacities to indicate that they had no objection to the grant being made to Jemima Wairimu Githaiga and Anne Wambui. It is inconceivable that the said Jemimah Wairimu Githaiga could later swear another affidavit on 4th February 2002 to say that Maina Githaiga and Keziah Njeri were not children of deceased. The averments in the two affidavits cannot stand together as they are totally contrary to each other. What this no doubt means is that one of them is false. No effort has been made to explain the about-turn from the position in the first affidavit. The deponent of these two affidavits has no doubt perjured herself. She has told untruths on oath. I would have recommended her for prosecution for perjury were it for the fact that she has since died".***

[18] We have absolutely no hesitation to state that we entirely agree with the learned Judge as these were valid concerns. The appellant failed to explain why when they petitioned for the letters of administration they included the respondent and his sister as the children of the deceased; why they changed their minds to later to deny them as children of the deceased. Before we pronounce ourselves in dismissing this appeal as we are about to also on merit, we reiterate that the oral evidence that was adduced by the respondent and his three witnesses who were not strangers but relatives of the deceased was clear. It was not controverted by the appellant that the respondent and his sister were children of the deceased. The appellant did not even bother to call any witness from the same family to support her contention that the respondent was a stranger to the deceased or to summon the mother of the respondent if she thought she was a crucial witness. She bore the burden of proving the facts that she alleged. It was not upon the court to summon witness for a party in a civil matter.

[19] We think we have said enough to demonstrate that we are ultimately convinced that the appeal is both incompetent and frivolous. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR