IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO 73 OF 2017

BETWEEN

BKN.....1ST APPELLANT

JMK..... 2ND APPELLANT

AND

TNW.....RESPONDENT

(Being an Appeal from the Judgment and decree of the High Court of Kenya

at Bungoma (Omondi, J.) dated 10th November, 2015

in

HC P & A Cause No. 27 of 2001)

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JUDGMENT OF THE COURT

This appeal relates to the estate of **JKNK** (deceased) who died intestate leaving behind a widow **BKN,** the 1st appellant. The deceased was also survived by several children one of whom is **JMK**, the 2nd appellant.

The appellants petitioned the High Court, at Bungoma in their capacities as the widow and son of the deceased, respectively, for grant of letters of administration intestate on 27th February, 2001. In the petition the appellants listed themselves together with ten children and a grandson of the deceased as the sole beneficiaries of the estate of the deceased.

When the respondent got wind of what was happening, she immediately contested and objected to the issuing of the grant on 11 th October, 2001 on the grounds that she too was the wife of the deceased having married him in 1991 under the Luhya customary law and together they were blessed with three issues; **LNK, LAK** and **SKK** born on 26th March, 1992, 13th March, 1996 and 14th July, 1998, respectively. They were all children of tender years and yet they had been left out as beneficiaries of the estate of the deceased by the appellants. No consent was sought or obtained from her before the appellants petitioned for the grant as was required. The appellants had concealed material facts and the respondent and her children stood to be disinherited were the objection not to succeed.

During the hearing, the respondent testified that the 1st appellant had recognized her as a co-wife as she lived with the deceased at **T, N scheme**. She produced a photograph showing the deceased holding one of their children with a motor vehicle belonging to him in the background in their home at T, N Scheme. Dowry was paid in April 1999 and a letter dated 15th May, 2003 from the Chief of Kiminini location referred to her and the deceased as husband and wife. Following the marriage, they were blessed with three children. However, upon the death of the deceased she was chased away from her Ndalu home by the 1st appellant and her daughter who also took away the car she had jointly purchased with the deceased. As a wife of the deceased and together with her children, they were therefore entitled to a share of the estate of the deceased.

The area Chief **William Wanjala *(Pw2)*** and the Assistant Chief, **Joseph Maboyi Manyili *(PW3)*** in their evidence all confirmed that the deceased had been married to two wives being, the 1st appellant and the respondent. The two wives each had their own homesteads on

adjacent plots separated by a road. There were three issues of the marriage between the deceased and the respondent. **FH *(PW4)*** produced birth documents relating to the 2nd child, **LAK**. He confirmed that from the birth register, the child was born on 13th March, 1996 in Eldoret District Hospital. The hospital had registered the birth. Upon registering the birth, the hospital surrendered the register to the office of the Registrar of Births and Deaths. The register indicated the father of the child as the deceased. The office received the notification of birth on 12th April, 1996. On his part, **Simon Kiplagat Rono *(PW5)*** confirmed and produced an acknowledgement of birth dated 13th March, 1996 with the name of the deceased as the father and the respondent as the mother.

The 1st appellant denied that the respondent was her co-wife. She claimed not to have known the respondent and that they met for the first time when the police arrested her on allegation that she, her children and brother in-law had demolished the respondent's house. She married the deceased in 1952 under Tiriki Customary Law and later solemnized the marriage in 1976 under the African Christian Marriage and Divorce Act. She contended that the deceased had shared out his entire estate before his demise. **ZK *(DW-2)***, son to the deceased conceded that his mother, the 1st appellant instructed Messrs. Yano & Co. Advocates to write a letter to the Commissioner of Police. In the letter the 1st appellant complained against a sergeant of police. In paragraph 2 and 3 of the said letter, it was stated that the respondent had been cohabiting with the deceased prior to his demise. On his part, **Gideon Osore Obilo**, the Chief of Ndalu location merely confirmed that the respondent's father was still alive at the time of the hearing of the objection.

The learned Judge in determining the objection held that there was no evidence to confirm that a traditional Luhya marriage had been performed between the deceased and the respondent. There was no proof of prolonged cohabitation either. There was no evidence to the contrary that the birth certificates produced by a representative from the Registrar of Births were not genuine. Further, there was no evidence that the respondent had other intimate relations with any other man other than the deceased. However, the learned Judge found that the respondent and deceased had been in an intimate relationship that brought forth the three issues who were thus entitled to benefit from the estate of the deceased pursuant to section 29 of the Law of Succession Act.

Dissatisfied with the judgment of the High Court, the appellants preferred this appeal in which they raised 17 grounds but which at the hearing were condensed into five being; burden of proof, bias, pleadings and evidence, extraneous evidence and DNA test. When the appeal came up for case management, parties agreed to file and serve on each other written submissions which directions were fully complied with. At the plenary hearing of the appeal, **Mr. Magare**, learned counsel appeared for the appellants whereas **Mr. Kebira**, learned counsel represented the respondent. They both relied on their respective written submissions and preferred not to highlight.

With regard to the burden of proof, counsel for the appellant submitted that the respondent failed to prove that she had borne children with the deceased. It was incumbent upon her to prove the paternity of the children. Having obtained a birth certificate after the objection proceedings had been filed and the deceased was already long dead, it was upon the respondent to request for DNA test and not the appellants. The initial burden of proof as enshrined in Section 107 of the Evidence Act was never discharged. Counsel faulted the High Court for shifting the burden of proof to the appellants to prove that the respondent had other relations with other men other than the deceased and that the request for a birth certificate was made solely by the respondent for the benefit of her objection.

Turning to bias, counsel submitted that the trial court treated the evidence of PW3 as neutral and disregarded the evidence of DW1 who was also a chief. The trial court upon holding that there was no evidence of long cohabitation of repute, proceeded to find that there was an intimate relationship between the respondent and the deceased giving rise to the alleged issues without having regard to the fact that the deceased was diagnosed with prostate cancer in 1986 and could not have had sex from that year.

With regard to extraneous matters, pleadings and evidence, counsel submitted that the court ignored the pleaded issues and proceeded to deal with un-pleaded issues. The respondent in her objection alleged to have been married in 1991 but in her evidence stated to have been married in 1990. No evidence was tendered regarding the birth certificates of the other children. Counsel further faulted the Learned Judge for holding that there was no dispute regarding the other children.

Counsel submitted that DNA was not pleaded in the High Court. There was no basis therefore for the respondent to revert to the issue. Each party was bound by their pleadings and the court cannot decide an issue not raised in the pleadings and unsupported by evidence. Therefore when the respondent pleaded that the children were the biological offspring of the deceased, there should have been no presumption of paternity when there was no marriage, counsel submitted.

In contesting the appeal, **Mr. Kebira**, submitted that in the circumstances of the case before the trial Judge, a true and just determination could not have been possible without shifting the evidential burden. The respondent did indeed prove that the deceased was the father of the children in question by producing documents and calling witnesses in support thereof and it was upon the appellants to tender evidence in rebuttal. The Learned Judge in mentioning the DNA test did not shift the burden to the appellants but rather suggested the same as a means to discharge the evidential burden. There was no evidence to suggest that the respondent was involved in other intimate relations with other men other than the deceased and that as a result of the intimacy, the three issues were born. Counsel further submitted that the appellants having indicated in their opening remarks that the respondent was married to someone else, had the burden to prove the same on which they failed miserably. It was counsel's submission that the testimonies of the respondent, PW2 and PW3, the 1st appellant's affidavit evidence in the originating summons and the letter the 1st appellant's counsel wrote to the Commissioner of police on the instructions of the 1st appellant complaining about a certain sergeant of police demonstrated that the three children of the respondent were born during the period of cohabitation and the deceased acknowledged and held himself out as the father of the said children. That in the circumstances of the case, the Learned Judge was entitled to make a presumption of paternity. The appellants failed to challenge the evidence by the respondent and her witnesses with regard to the other two children. The respondent produced foundational documents issued by the Registrar of Births and Deaths issued when the deceased was still alive and therefore the appellants cannot discredit the birth certificate tendered in evidence after the death of the deceased.

With regard to the findings of fact, counsel submitted that the evidence of PW2 and PW3 manifested a social circumstance from which a polygamous family set up could be deduced. The 2nd appellant admitted in evidence that the person in the photograph tendered in evidence was his deceased father and the motor vehicle in the photograph was the same one in dispute between the 1st appellant and the deceased immediately prior to the deceased's death. There was no evidence contradicting the fact that the photograph was taken outside the house

where the respondent, the deceased and the three issues were residing.

This is a first appeal, and being so, it is our duty to re-evaluate the evidence tendered in the trial court and come up with our own independent findings and conclusions with the caveat that since we did not participate in the real trial we should pay homage to the findings of fact by the trial court as well as its observations with regard to the demeanor of witnesses. See **Peters v. Sunday Post [1958] EA 424**.

We have carefully perused the record of appeal, rival written submissions by counsel and the law. The issue for determination is to our mind simple and straight forward; whether the issues in question are children of the deceased for purposes of the law of succession. The trial court made no findings as to whether or not the respondent was a wife of the deceased and as such entitled to benefit from the estate of the deceased. Further, no cross-appeal has been lodged in respect of that aspect of the matter by the respondent.

With regard to the three issues, it is not in dispute that the respondent was known to the deceased. She was known even to the 2nd appellant who confirmed that he had heard of her existence and cohabitation with his father. In the Judicial Review proceedings dated 9th July, 2001 filed by the appellants against the respondent in which they challenged the findings of Tongaren Land Disputes Tribunal that the respondent was a legal wife of the deceased, as well as the originating summons filed by the 1st appellant against the deceased, the appellants made reference to the respondent in their supporting affidavits of both applications. Therefore the appellants cannot claim that they did not know the respondent and her relationship with the deceased and only came to know her when they were arrested following a complaint to the police by the respondent regarding the demolition of her house by the 1st appellant, her children and brother in-law soon after the death of the deceased. We think therefore that the appellants were not forthright and credible witnesses. We are of the view that the appellants knew the respondent and her relationship with the deceased in more ways than they were willing to disclose to the court.

On the other hand, we are convinced that PW2 and PW3 were witnesses of truth and had no reason to lie to the court when they testified that the appellants and the respondent lived in residences adjacent to each other but which were separated by a road and that the respondent and the deceased had begotten three children together. It is also not in dispute that the 1st appellant appreciated that the deceased was in an adulterous relationship and was cohabiting with the respondent in her originating summons dated 18th August, 2000 in which she sought from court several declarations against the deceased when alive with regard to ownership of several properties detailed therein. Some of the pertinent declarations sought were whether the deceased had engaged in an adulterous relationship with the respondent and whether the deceased was cohabiting with the respondent.

The respondent produced a birth notification, birth register *(foundation documents)* and a birth certificate as proof that her three children were sired by the deceased. Representatives from the Registrar of Births and Deaths *(PW4 & 5)* were summoned and they testified to the authenticity of the foundation documents which were the basis for the issuance of birth certificates. Those documents had been lodged immediately after birth and prior to the passing on of the deceased. There was no evidence in rebuttal by the appellants with regard to those foundation documents, that is, the birth register and birth notification forms. So it matters not that the birth certificates were produced after the death of the deceased. The respondent took all the necessary steps to prove what she alleged and as such discharged her evidential as well as burden of proof contrary to the submissions by the appellants. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others (2014) eKLR** the Supreme Court held inter alia:

> ***"The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".*** Emphasis ours.

We have no doubt at all that the respondent discharged both burdens successfully.

Further, Section 12 of the Registration of Births and Deaths Act provides insight on how the deceased's name came to feature on the birth certificate produced in evidence. The section provides:-

> ***"No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom***." (Emphasis added)

It cannot therefore be said that the respondent acquired the birth certificate by any other means other than as provided for in the law above. In the circumstances of this case, the only logical conclusion is that the deceased's name was entered into the register as the father either at the joint request of deceased and the respondent or after the registrar was satisfied with the evidence tendered regarding their relationship. No contrary evidence was proffered by the appellants.

Further, whether the three issues were biological children of the deceased was put to rest by the testimony of the respondent, PW2 and 3. Their evidence was not seriously challenged. Even if the contrary was the case, then there was evidence that the deceased had voluntarily assumed responsibility over them and indeed held himself out as their father. The deceased had deserted the 1st appellant and was staying with the respondent and the children prior to his death. What the respondent had to show and indeed did was that there was on a balance of probability, evidence of a relationship between her and the deceased that brought forth the children as a consequence of their intimate relationship. Further, she demonstrated to the court that the deceased was the putative father or had assumed the role of being their father and or held himself out as such. Accordingly, we cannot fault the learned judge for so holding. Sections 3 (2), (3) (4) and (5) of the Law of Succesion Act significantly provides for the right to inherit as follows:

> ***"(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male***

person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.

(4) Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he has apparently attained the age of eighteen years, and shall not otherwise be so treated.

(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act." Emphasis ours.

Further, section 29 of the Law of Succession Act is clear on who a dependent is and this includes:

"… wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death …."

And in this case the children qualified as dependents who under section 26 of the Law of Succession Act are entitled to a share of the estate.

So that whichever way the appellants want to look at it, the issues were the children of the deceased in fact and in law. Factually, there was the evidence of PW2, PW3, 1st appellant's affidavit evidence and the letter written by the 1st appellant's lawyer to the Commissioner of Police on the appellant's instructions that make reference to the respondent and the children. In any case of the three issues, the appellants only challenged the paternity of one, LAK, but this contention was disabused or debunked by the testimonies of PW3, 4 and 5. Then there was a photograph of the deceased holding a child with a motor vehicle believed to be his in the background. Which person would take a photograph with a child who is a total stranger to him. The photograph which was not challenged could only have demonstrated a special relationship between the deceased and the child perhaps. May be as a father. The appellants having not challenged the paternity of the other two children, it must be taken that they were at peace with their paternity.

With regard to DNA testing, it is to our mind a non-issue. It was not pleaded and no party requested for one. The Learned Judge only mentioned the same as a possible remedy the appellants would have applied for if they were not satisfied with the evidence provided as proof of paternity. By so observing the learned Judge was not shifting the burden of proof to the appellants as claimed. Further when the trial court ruled that there was no evidence that the respondent was involved in intimate relations with other men that could have led to the birth of the three issues, the trial court was not shifting to the appellants the burden of proof as claimed by the appellants. The appellants had stated that they intended to call evidence and demonstrate that the respondent was married to another man. However, the threat never came to pass.

On the question of the alleged bias, the court record does not demonstrate the same. The court treated PW2 and 3 as independent witnesses by virtue of their positions in Public Service that they held. Though DW1 held similar positions as PW2 and 3 aforesaid, his testimony was only limited to confirming that the respondent's father was alive. That had nothing to do with the paternity of the issues. That testimony was therefore of no value at all on the issue in contestation. All in all we do not discern any bias in the manner the judge treated the evidence that was before her.

From the foregoing, we find that the issues in question were children of the deceased for all intents and purposes. There was sufficient proof to link the children's paternity to the deceased. They were therefore entitled to a share of the estate of the deceased as correctly found by the trial court.

The upshot is that we find no reason to interfere with the finding by the trial court and therefore the appeal fails and is dismissed with costs to the respondent.

Dated and delivered at Eldoret this 25th day of July, 2019.

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.