IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, J. MOHAMMED & KANTAI, JJ.A)

CIVIL APPEAL NO. 389 OF 2017

BETWEEN

ROSE WAMBUI KIARIE.....APPELLANT

AND

JANE NJERI NGARUIYA.....RESPONDENT

(Being an Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ougo, J.) delivered on 25th June, 2015 ***in Succession Cause No. 1870 of 2005)***

JUDGMENT OF THE COURT

1. In a ruling delivered in High Court Succession Cause **No. 1870 of 2005** on 25th June, 2015 the High Court at Nairobi (Ougo, J) made findings to the effect that although Jane Njeri Ngaruiya (the respondent) had failed to adduce sufficient evidence to prove that she was a wife of Joseph Kiarie Tuba, (the deceased), there was the possibility of the existence of a relationship between them and that her two sons who were claiming through her qualify as dependants and ought to be included as beneficiaries in the application for confirmation of grant in respect of the estate of the deceased. The said ruling is the subject of this appeal.

2. A brief background of this case is that the deceased died intestate on the 25th of February, 2005. On the 7th of July, 2005, the respondent applied for grant of letters of administration in respect of the estate of the deceased. Despite having named the appellant as a co-petitioner, she did not sign the forms constituting the petition lodged before the court. On the 15th of August, 2005 the appellant raised an objection to the said petition vide her grounds of objection dated 9th August, 2005. She stated that the respondent as the petitioner was an intruder and a total stranger to the estate of the deceased and that the respondent had moved the court without the knowledge and consent of the other beneficiaries.

3. On that question, the respondent filed a replying affidavit dated the 8th March, 2005 where she claimed to have been a wife of the deceased with whom they had sired three children among other grounds.

4. Despite the objection proceedings having been filed, it appears that a grant of letters of administration in respect of the estate of the deceased was issued to the respondent under unclear circumstances on the 24th November, 2005 as is evident in the proceedings.

5. On the 17th of January, 2006, the appellant moved the court vide summons and affidavit in support dated 13th January, 2006 where she sought orders for revocation of the said grant of letters of administration on the grounds that: the petitioner (the respondent herein) fraudulently and irregularly obtained the grant, as the appellant is the sole widow to the deceased; the grant was irregular in that there are minor children and the grant was issued to only one person in contravention of the law and; the petitioner is an impostor and is not entitled a share in the assets belonging to the deceased.

6. The respondent opposed the application vide a replying affidavit dated 16th March, 2006 deposing inter alia that she was the 1st wife of the deceased between 1970 and 1976 following a Kikuyu customary wedding between them and they had children who were rightful heirs to the estate of the deceased.

7. Before the hearing of the application for revocation of grant could be heard, the appellant moved the court yet again when it came to her attention that the respondent had sometime in July 2007 proceeded to withdraw a sum of Kshs. 429,080/- from the deceased's account number KRUI 10981 held at Kenya Post Office Savings Bank Limited, (Post Bank), Head Office Branch. Following such discovery, she instituted summons and affidavit in support dated and filed on the 25th of January, 2008 seeking orders as against the respondent and Post Bank with a view to have the money reimbursed and stop any further interference or intermeddling with the estate of the deceased.

8. The application was opposed by both the respondent and the bank vide the respondent's replying affidavit dated 1st February, 2008 and

one filed on behalf of the bank deponed by one Mercy Njeri Kagiri Mbijiwe, the company secretary of Post Bank, dated the 13th of February, 2008 respectively. Both the appellant and respondent also filed further affidavits dated 25th February, 2008.

9. Upon consideration of the aforementioned summons on merit, a ruling was delivered on the 22nd July, 2008 by Rawal, J (*as she then was*) in favour of the appellant as against the respondent and the bank who were ordered to return the money that had been withdrawn from the deceased's account. In addition, the respondent was also removed as an administratix of the estate based on the court's findings that she had breached her duty as an administratrix and the appellant was made the sole administratix of the estate.

10. The appellant subsequently filed an application for confirmation of grant vide summons for confirmation of grant dated 3rd March, 2011 supported by an affidavit sworn on even date and filed in court on the 4th March, 2011. The appellant sought distribution of the estate of the deceased to be made to her and her children. The respondent together with her children were excluded from the mode of distribution. The respondent consequently filed an affidavit of protest to the proposed mode of distribution vide an affidavit of protest dated 10th March, 2011 and filed in court on the same day.

11. The matter came up for hearing on the 12th November, 2014. The court noted that there were two applications coming up for hearing on the saiddate being the summons application for revocation of grant dated 13th January, 2006 and the summons for confirmation of grant dated the 3rd March, 2011.

12. In respect of the summons for revocation of grant, it would appear the same had been overtaken by events in view of the ruling delivered by the Rawal J (*as she then was*) on the 22nd July, 2008. In the said ruling the learned Judge had made a finding that the respondent herein was in breach of her duty as an administratrix. The court ultimately exercised its discretion and removed her as an administratix and thereafter made the appellant herein the administratrix to the estate of the deceased.

13. The application for confirmation of grant proceeded by way of oral evidence on the 12th November, 2014. The appellant told the court that she met the deceased in 1979 and that they stayed at Kamuthi area and later on acquired properties together including the properties giving rise to the succession proceedings. She averred that they were blessed with seven children referring the Court to their birth certificates. She maintained that she and the deceased got married under the Kikuyu customary law and later conducted a wedding at the District Commissioner (D.C.s) office; she referred the Court to the marriage certificate dated 18th September, 2001.

14. On cross-examination, she gave an account of the properties bought by the deceased. She confirmed that she stayed with the deceased until his death and that upon his death the respondent had obtained an order stopping the body from leaving the mortuary; she however succeeded in getting a permit to bury the deceased, which she proceeded to do. The appellant further confirmed that at some point the deceased had been called to the chief's office over the alleged neglect of the respondent as a wife sometime in 1999 but she had not previously heard that he had a wife elsewhere. She averred that during the said proceedings the deceased told the chief to take him to Court however no proceedings were instituted and that the respondent had not shown up to object to their wedding.

15. The appellant further relied on the testimony of one Francis Nganga called as PW2 who confirmed that he grew up with the deceased and that they went to school together. The witness deposed that the deceased was married under customary law and that the deceased and the appellant formalized their marriage at the D.C's office in 2001. He maintained that the respondent was not married to the deceased and only knew her as a bar attendant working in a bar in the same neighborhood.

16. On her part, the respondent testified on the 15th December, 2014 where she averred that she was married to the deceased under customary law in 1970 and that they were blessed with two children, one of who was deceased. The respondent deposed that the deceased bought 4 plots in Kiamumbi but she and her children were not staying together with the deceased. However, she maintained that the deceased assisted her during their separation by providing rent and food. The respondent deposed that she lodged a dispute at the Chief's offices so that the deceased would provide for her children with a place to build a house/home. Further, that the elders told her to go back to the deceased if she wanted the property to be provided to her children. She testified that the Chief subsequently sent her to the D.O.'s office where she found a letter by one Mr. Mwangi, the deceased's advocate, stopping the proceedings to provide for the respondent and her children.

17. The respondent averred that upon death of the deceased, she filed a suit at the Milimani Court and consent was recorded for the burial to proceed. Thereafter she decided to petition the court so as to have her and her children included in the distribution of the deceased's estate. The respondent therefore prepared the said petition and requisite forms and joined both families; she stated that she intended to take out letters of administration together with the appellant who was served with a citation but did not respond on time.

18. On cross-examination the respondent deponed that she was married to the deceased from 1970 to 1976 but all the witnesses at the wedding had since passed on. She testified that their first child, Andrew Ngaruiya, was born in 1970, second child, David Tuba in 1972 and the 3rd child, Kimani Daniel, in 1974. However, she stated that the said children did not have birth certificates and that the first child was named after her father and that she and the deceased were married by then. The respondent maintained that when she bore Andrew she and the deceased were friends and they had not started cohabiting. She stated that she and the deceased were separated between 1976 and 1996 during which period she stayed in Kangundo but she used to visit him at home and that the deceased assisted her and had even indicated that he would give her children a place to stay. She also maintained that her relationship with the deceased continued until his death. The respondent further deponed that she did her own business to cater for the children's needs due to disagreements with the deceased on maintenance.

19. The respondent also relied on the testimony of one Joseph Njuguna Njoroge called as DW2 who testified that he had known the respondent as well as the deceased since 1963 and they used to stay at Kiamumbi area. He stated that he knew the respondent and the deceased to be husband and wife and that they had three children, one of who was deceased. On cross-examination, he testified that he did not recall when the two got married; he however stated that they stayed together for about 7 years but did not know exactly when they started living together. He further deposed that the respondent and the deceased had married under Kikuyu customary laws but he neither witnessed the ceremony nor did not know when the ceremony was done. He further testified that he did not know whether the deceased and the

respondent had separated or where the respondent stayed after their said separation.

20. Parties subsequently exchanged written submissions; the appellant filed her written submissions on the 2nd March, 2015 while the respondent filed her submissions on the 17th March, 2015. The appellant filed replying submissions on the 20th March, 2015, which were followed with the respondent's submissions on the issue of revocation of grant filed on the 23rd March, 2015.

21. After considering the evidence before her, the learned Judge delivered a ruling, now impugned, on the 25th June, 2015. In her findings, the Judge stated that the respondent's claim that she was a wife under the Kikuyu customary law had to be proved in accordance with such customs. She further went on to state that the essentials of a Kikuyu Customary marriage were documented and codified in **Cotran, The Law of Marriage and Divorce** where they were summarized as: capacity to marry; consent of parties; *"ngurario"; "ruracio"* and; commencement of cohabitation. The court was ultimately persuaded that the respondent had not adduced sufficient evidence to prove that she was a wife, if at all, for the purposes of succession.

22. The learned Judge expressed that **"it appears as if there could have been a relationship between the respondent and the deceased and that two children were sired who under section 29 qualify as dependants and as such should be treated as beneficiaries in the application for confirmation of grant''.** The said findings form the gravamen of this appeal.

23. The appellant has raised 6 grounds of appeal *inter alia* that the learned Judge erred in law and in fact: by making assumptions as to the existence of a relationship between the deceased and the respondent contrary to the evidence on record; by purporting to determine issues relating to dependants whilst the said issue was neither pleaded, identified as an issue or canvassed by the parties before her; by purporting to declare the two sons of the respondent as dependants and beneficiaries of the estate of the deceased as against the weight of the evidence on record and contrary to the **Law of Succession Act, Cap 160 of the Laws of Kenya** and; by failing to appropriately consider and evaluate the evidence adduced by the parties and the documents produced hence falling into error and; by finding that the properties in issue were acquired by the joint efforts of the appellant and the respondent.

24. At the plenary hearing of this appeal on the 17th June, 2019 parties were represented by learned counsel, Mr. Mwangi Kigotho for the appellant and Ms. Linda Kamaliki for the respondent. The appellant relied on her written submissions together with the list of authorities filed on the 6th September, 2018 while the respondent relied on her submissions and list of authorities filed on the 30th October, 2018. Mr. Kigotho made extensive highlights but Ms. Kamaliki wholly relied on the written submissions save for adding that although dependency had not been pleaded, they were invoking section 26 of the Law of Succession Act to claim dependency.

25. In a bid to demonstrate why this appeal should be allowed, Mr. Kigotho submitted that the main issue for determination was the question of who was a wife to the deceased. Counsel contended that no application under section 26 of the Law of Succession Act was placed before the court and that the issue of dependency was neither pleaded nor placed before the court as an issue for determination hence no evidence to that effect was adduced. He argued that dependency has to be pleaded and or applied for and sufficient evidence of such dependency must be placed before the court for it to make a determination as to whether a party is a dependant or not. He urged that to that extent the court erred in law and in fact in determining an issue that was neither pleaded nor framed as an issue for determination, and was unsupported by any evidence.

26. Counsel for the appellant also submitted that the learned Judge erred in making assumptions of the existence of a relationship between the deceased and the respondent out of which two children were sired, without considering that an application for dependency and proof of existence of the same was not adduced; he argued that the issue of paternity of the respondent's children was never raised or placed before the court for determination. Counsel submitted that had paternity of the said children been an issue for determination, scientific evidence by way of DNA evidence would have been sought and obtained to prove with certainty the said paternity before the court could make a final determination, hence it was erroneous for the learned Judge to make such a finding.

27. Counsel posited that the learned Judge erred in both fact and law in finding that the children of the respondent were both dependants and beneficiaries of the estate of the deceased in absence of tangible evidence of such dependency being adduced.

28. Relying on the decisions in **Njoki v. Mutheri (1985) KLR** and **Anastacia Mumbi Kibunja & Others v. Njihia Mucina & Others Civil Appeal No. 10 of 2018,** counsel argued that having established that the respondent had not adduced sufficient evidence to prove that she was a wife as per the issues drawn by the parties, the learned Judge's mandate ended and there was no basis for finding that the children were dependants as that was not an issue placed before the court for determination. Counsel therefore urged the Court to allow the appeal.

29. Opposing the appeal through the written submissions, counsel for the respondent submitted that in the respondent's affidavit dated 16th March, 2006, the respondent deposed that she was married to the deceased under Kikuyu customary laws in 1970 and that they lived together up to 1976 when they separated having sired three children with the deceased but one child died later. Counsel contended that the provincial administration and the village elders had discussed the issue of her marriage to the deceased and that the deceased admitted before the elders that she was his wife. Counsel made reference to an affidavit by one Salome Wairimu Mugo who testified as to the payment of dowry by parents of the deceased and also the affidavit of one Joseph Njoroge who confirmed that the respondent and the deceased were husband and wife.

30. On the issue of dependency, counsel submitted that the respondent testified that she was a wife of the deceased and that they sired two children and that the deceased used to support the two sons, therefore the respondent and the children qualify as dependants under **Section 26 of the Law of Succession Act, 2007**. She urged the Court to dismiss the appeal.

31. This being a first appeal, the duty of the Court is as was circumscribed in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where this Court stated as

follows: -

"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 Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

"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."

32. With this in mind, we shall now revisit the evidence adduced before the trial court *vis-a vis* the submissions which we have rehashed above extensively. It is important to note from the outset that there is no cross appeal and so the finding by the learned Judge that there was no marriage between the respondent and the deceased has not been challenged. According to the learned Judge there was a possibility of a relationship between the deceased and the respondent from which the respondent's two sons were born. It would appear that the respondent's counsel has misconstrued and/or misapprehended the nature of the legal questions subject of this appeal. We say so because counsel has extensively evaluated the evidence submitted before the trial court in an effort to demonstrate that indeed there was an existing customary marriage between the respondent and the appellant. As stated above, the issue as to whether there existed a marriage between the respondent and the deceased was an issue determined with finality by the trial court and no cross-appeal was filed in respect of the issue. For the avoidance of doubt however, it is important for us to reiterate that the learned Judge found there was no customary marriage between the respondent and the deceased.

33. This leaves us with only one issue for determination; whether from the evidence on record, the two sons of the respondent were sired by the deceased as claimed, to entitle them to a share of the deceased's estate as dependants or beneficiaries. The learned Judge used both terms, ie "dependants" and "beneficiaries" and we shall endeavor to establish if from the record before us the two sons of the respondent qualify to inherit from the deceased.

34. It is therefore imperative for this Court to examine the relevant provisions of the Law of Succession Act as relates to the matters in question. **Section 29** of the Law of Succession Act, defines a dependant in the following terms;-

"For the purposes of this Part, "dependant" means —

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; *(Emphasis supplied)*

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

35. The respondent's claim is that her sons were the deceased's children. Of relevance to this case is **section 29(a)** above. Was there sufficient evidence placed before the trial court to prove that the two children were sons of the deceased? From what we can decipher from the record of appeal, the respondent claimed to have had a relationship with the deceased between 1970 and 1976 and that is presumably when her two sons were born. From the same record, there is evidence that the said persons have no birth certificates to establish when they were born and that her first child was born when the respondent was still staying with her parents and he was actually named after the respondent's father. It is common knowledge that under Kikuyu customary law, the first born son is always named after the father's side. The naming would therefore cast aspersion as to whether the child was indeed the deceased's son. There was also no forensic evidence like DNA tests to establish any blood relationship between the deceased and the respondent's sons.

36. Although the respondent made reference to proceedings before the local provincial administration, there is nothing in the said proceedings on record to suggest that the two children in question were those of the deceased. Further, the very issue of whether the said children were indeed those of the deceased was in itself a contested issue in the said proceedings. It was therefore incumbent upon the respondent or the two adult children to establish paternity. What would give legitimacy to their paternity claim in as far as the deceased was concerned? We also note that the deceased had denied the two during his lifetime when the respondent attempted to stake a claim on the deceased's property almost 30 years after leaving the deceased. In our view there was paucity of evidence to support any claim that the respondent's sons were children of the deceased to entitle them to claim any part of his Estate as beneficiaries.

37. On the issue of dependency, we note that there was no application for dependency upon which the said children could be considered as dependants for purposes of distribution of the estate of the deceased. **Section 26** of the Law of Succession Act makes extensive provisions regarding dependency as follows; -

"26. Provisions for dependants not adequately provided for by will or on intestacy Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate." [Emphasis supplied]

38. Section 27 of the Act on the other hand provides a follows; -

> ***"27. Discretion of court in making order. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.***"

39. From the foregoing provisions, there are express legal provisions under the Law of Succession Act in respect of dependency. Any person, who considers himself a dependant for purposes of **section 29** of the Law of Succession Act, has a duty to move the court under section **26** and establish the nature of dependency. A court cannot assume jurisdiction over a matter of dependency and make a determination as to whether or not a person is a dependant and/or the extent and nature of the dependency in accordance with the provisions of **section 29** in the absence of a competent application and sufficient evidential material in that regard. Such dependency must be established before the court can make reasonable provisions for the dependant out of the estate of the deceased.

40. In the present case, there was no application filed by any person claiming dependency in order to invite the trial court to make a determination on the issue; the issue of dependency was not pleaded and there was no evidence adduced before the court to demonstrate or to prove the extent and nature of the dependency by the alleged children of the deceased to invite the exercise of discretion of the court in that regard.

41. Further, the parties also framed the issues for determination, which did not include the dependency of the respondent's children. There is no doubt that the question of dependency was therefore not one of the issues for determination before the court as the same was neither pleaded nor evidence adduced in that regard. In the case of **Maithene Malindi Enterprises Limited vs. Kaniki Karisa Kaniki & 2 others [2018] eKLR** this Court held as follows; -

> ***"As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. This position was restated by this Court in Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR: -***
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> ***"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well- intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."***

Nevertheless, a court may base a decision on an unpleaded issue where it appears at the trial that the issue has been left to the court for decision. In the case of Odd Jobs vs. Mubia [1970] EA 476. Law, J.A (as he then was), at page 478 paragraph 9-11 had this to say:-

> ***"On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision..."***

42. It is trite that the court cannot make determinations on an unpleaded issue. As observed above, although as an exception to the general rule, the court is entitled to make a finding on an unpleaded issue, if the issue arises in the course of the hearing and is canvassed fully by the parties,this was not the case in the trial court. There is a threshold which must be met for a claim of dependency to succeed and there is abundant jurisprudence in this area. There was no iota of evidence placed before the trial court to show that the two persons were dependants of the deceased.

43. In view of the foregoing, having re-evaluated the evidence adduced before the High Court, the memorandum of appeal, submissions by both counsel and the law, we have arrived at the inescapable conclusion that this appeal has merit and allow the same and set aside the portion of the impugned Ruling declaring the two sons of the respondent as dependants and beneficiaries of the Estate of the deceased. We also award costs of the appeal to the appellant.

Dated and delivered at Nairobi this 25th day of October, 2019.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR