



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & KANTAL, J.J.A.)

CIVIL APPEAL NO 384 OF 2017

BETWEEN

MARGARET ISUTSA KIRUI.....APPELLANT

AND

ROSEMARY SANG.....RESPONDENT

(Being an Appeal from the Judgment and Order of the High Court of Kenya at Nairobi (L. Kimaru, J.) delivered on 9th May, 2013

in

H.C. Succession Cause No. 1559 of 1995)

JUDGMENT OF THE COURT

1. Kipkoech Kirui (hereafter the deceased) died on 3rd November, 1994 leaving a Will appointing National Bank of Kenya Limited as executors thereof. National Bank of Kenya (the executor) thereafter renounced executorship, leaving no proving executor.
2. A Grant of letters of administration with Will annexed was given to Margaret Isutsa Kirui, wife to the deceased on 28th September, 1995 and confirmed on 23rd February, 1996. It would however appear from the record that the court was not satisfied with the manner in which she was administering the deceased's Estate after she failed to file accounts, having been ordered to do so by the court.
3. Consequently, the High Court Rawal, J (*as she then was*) on 2nd June, 2009 revoked the said Grant of letters of administration and issued a fresh grant of letters of administration to Rosemary Chepkorir Sang, the objector in the succession proceedings. The Court also directed Rosemary to file and serve summons for confirmation of grant to all the beneficiaries within 21 days of 2nd June, 2009. It is worth of note that the said grant was revoked almost 13 years after confirmation and some of the properties listed in the Will had already been distributed as per the deceased's Will but the Estate had not been wound up by then.
4. Following Rawal, J's Orders, the appellant filed summons for confirmation of Grant. Several other applications were filed before the summons for confirmation of Grant could be heard. However, the parties consented to have all the applications withdrawn to give way for the hearing of the application dated 3rd November, 2009 filed pursuant to **Rule 73 of the P & A Rules** and **Order XLIV Rule 1(1)(a) of the Civil Procedure Rules**. The application was by Margaret (appellant) seeking a review of the court's earlier decision to revoke the Grant issued to her, and giving the same to Rosemary (respondent).
5. One of the grounds raised in that application which is germane to this appeal was that the learned Judge erred in issuing an intestate grant while the deceased had left a valid Will. The other ground was that a notice of appeal had been filed against the order sought to be reviewed, and in the circumstances the High Court had no jurisdiction to entertain the Review application. Having given full consideration to the matter Nambuye, J. (*as she then was*) dismissed the application holding that in revoking the Grant on its own motion, the court had acted within the ambit of the pre-requisites set out in **Section 76 of the Law of Succession Act**. The learned Judge also advised Margaret to file a protest in respect of the summons for confirmation through which she would "*prove or disprove*" the contents of the Will.

This is what the learned Judge said:-

“Equality of delivery of justice to all demands that the parties be placed on equal footing at the application for confirmation by the respondent. Through this proceeding, the respondent and those claiming through her will either prove or be

disproved in their claim. Likewise, the applicant will either prove and be disproved on the assertion of the will being proper. If the Will is upheld, the issue of provision of a dependant will be interrogated and appropriate orders made. In the event of the Will being upset, the court will have an opportunity to distribute the Estate accordingly...”

6. It would appear that following Nambuye, J’s ruling Margaret filed an affidavit of protest as advised. The same is dated 6th May, 2013 almost two years after Nambuye, J’s Ruling. Unfortunately, the record of appeal before us has nothing to show what could have happened between 6th May, 2013 when that affidavit was filed and 9th May 2013; but parties appeared before Kimaru, J. on 9th May, 2013 and without any hearing or proceedings recorded to show what happened in court, the deceased’s estate was distributed. There is no mention of the fate of the protest filed by the appellant and so there was no determination whatsoever on the validity or otherwise of the Will.

7. That is the Ruling that has been challenged in this Court vide the 5 grounds proffered in the Memorandum of Appeal dated 14th November, 2017.

8. The gravamen of all the grounds of appeal put together is whether the learned Judge erred in distributing the deceased’s estate under the law on intestacy when there was still a valid Will which had not been disproved.

9. Submitting on behalf of the appellant, learned counsel Mr. Ngeru informed the Court that Nambuye, J. in her ruling had directed the appellant to file the affidavit of protest which she did. The said affidavit had nonetheless been totally ignored when Kimaru, J. distributed the land and confirmed the grant while totally oblivious of the fact that there was a Will in existence. Counsel urged the Court to set aside the impugned ruling and send the application for confirmation back to the High Court for rehearing, and for the distribution to be done in accordance with the deceased’s Will.

10. In response Mr. Siele, learned counsel for the respondent posited that the appeal had been overtaken by events because the grant has already been confirmed.

11. His second and rather strange submission was that this Court lacks jurisdiction to hear appeals in succession matters. Although he said there is a “*wealth of decisions in support*” of that position, not a single decision was cited to us.

12. We have considered the record before us, both written and oral submissions of counsel, and the law. As the respondent has challenged this Court’s jurisdiction to hear the appeal and as jurisdiction is what clothes the court with the power and authority to determine matters, we shall deal with that issue first.

13. Mr. Sigei’s assertion that this Court has no jurisdiction to hear appeals in Succession matters is unfortunately not anchored on any law known to us. Indeed, learned counsel did not cite any law or avail any decisions of this Court on that issue. All we need to say on this point is that this Court by dint of **Article 164(3) (a) of the Constitution of Kenya 2010** and **Section 3 of the Appellate Jurisdiction Act** is endowed with jurisdiction to hear appeals from the High Court, and this includes appeals in succession matters. Indeed, this Court is awash with such appeals some of which have been heard to conclusion while others are still pending hearing. The appeal before us is in respect of a matter filed before the High Court in its original jurisdiction and any party being dissatisfied with any decision rendered by the High Court in its original jurisdiction can move this Court on appeal as of right, save in few instances where leave may be required. There is no provision in the Law of Succession Act barring a party from accessing this Court on first appeal as of right. **Section 50 of the Law of Succession Act** only bars second appeals where the decision being challenged emanates from the Magistrates Court pursuant to **Section 49** of the same Act. We think we do not need to belabor this issue. It suffices for us to state that this Court is properly seized of this matter.

14. On the grounds raised in the memorandum of appeal, as stated earlier, the issues can be compressed to one; whether the learned Judge was in order to distribute the Estate of a deceased as an intestate estate where there was a Will which had not been disproved, or annulled. It is common ground that the deceased’s Will has never been proved or disproved as required under the Law of Succession Act. That needed to be done and the court could only resort to intestate distribution of the deceased’s estate if the Will was disproved or annulled.

15. From the record, we have noted from the proceedings of 9th May 2013, that no party was heard; indeed, there is nothing in evidence to show that the hearing of the application for confirmation of the Grant was ever conducted. What the record shows is the coram confirming that the parties were present but even before being addressed by any of the parties or their counsel, the learned Judge proceeded to state “*The Estate of the deceased shall be distributed as follows...*” then he proceeded to distribute the properties. One would be forgiven for thinking that the learned Judge came up with the list of distribution *suo motu*, disregarding the contents of the Will and without input by any of the parties.

16. We are in agreement with the appellant that this was wrong. The law requires that where a Will has been filed in court along with the application for probate, then unless the said Will is disproved, the court cannot ignore it and proceed to distribute the deceased’s property under the rules governing intestacy. Even in cases of intestacy, the court cannot impose the mode of distribution on the parties before hearing them on the issue. To this end therefore, the learned Judge fell into error when he did the distribution of the estate in the manner described above.

17. From the foregoing, it is evident that the appeal has merit. It is unfortunate that parties herein have been litigating over the deceased’s estate for more than two decades and the courts in the interest of justice would be eager to bring to an end such litigation, which is more often than not quite acrimonious. That notwithstanding, parties should be heard before such distribution is done.

18. In conclusion, we allow this appeal and set aside the confirmation and distribution of the Estate made on 9th May, 2013 and remit the matter back to the High Court for hearing of the summons for confirmation of Grant dated 16th July, 2009 along with the affidavit of protest filed by the appellant as advised by Nambuye J.

19. In view of the circumstances of the case, we order that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 6th day of December, 2019.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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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