



REPUBLIC OF KENYA

THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, J.J.A)

CIVIL APPEAL NO. 91 OF 2017

BETWEEN

LITA VIOLET SHEPARD.....APPELLANT

AND

AGNES NYAMBURA MUNGA.....RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Musyoka, J.) dated 25th September, 2015*

in

**Succession Cause No. 1327 of 2010)**

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**JUDGMENT OF THE COURT**

1. **LITA VIOLET SHEPARD**, (the appellant) brought this appeal against the ruling and order of the High Court of Kenya at Nairobi (Hon. Mr. Justice W. Musyoka) delivered on the 25th September, 2015 dismissing the application for review of the judgment by Hon. Mr. Justice L. Kimaru delivered on the 5th April, 2014. The said application for review had been filed by the appellant against **AGNES NYAMBURA MUNGA**, (the respondent).

2. Briefly the facts of this matter are that, the respondent by an application brought under **Section 26 of the Law of Succession Act**, sought provision as a dependant of the estate of the late BRYAN WALTER SHEPARD (the deceased). The deceased died on the 29th March, 2010 as a result of a plane crash. The deceased died testate having left behind a Will he executed on the 29th January, 1999. Under the said Will the deceased appointed the appellant, who was his wife, as the executor of the Will and bequeathed all his property to the appellant and their daughter, Jeneatte Dorothy Labonte.

3. The appellant, as executor of the Will, petitioned the court for grant of probate of the deceased's estate. The respondent upon learning of this petition by the appellant filed an objection thereto. Contemporaneously with filing the objection, the respondent filed an application under **Section 26 of the Law of Succession Act** (the Act) under which he sought to be provided for by the estate of the deceased as a dependant thereto. In the affidavit in support of the application the respondent deposed that she was a common law wife of the deceased having been married under the Kikuyu Customary Law. The respondent contended that before the demise of the deceased she was his dependant within the meaning of **Section 29** of the Act. The respondent further contended that she had cohabited with the deceased for 20 years prior to his death and that the deceased used to cater for all her financial needs. She deposed that the estate of the deceased was worth approximately KShs.1,000,000,000/= and stated that she did not know why the deceased did not provide for her under the Will.

4. The appellant swore a replying affidavit opposing the application and denied that the deceased was cohabiting with the respondent at the time of his death and further denied the existence of any marriage between the deceased and the respondent. The appellant deposed that she was the only dependant of the deceased. She denied that the estate of the deceased was valued at KShs.1,000,000,000/= as alleged by the respondent. The parties then filed witnesses' statements in support of their cases and agreed that the application be disposed of by written submissions. Kimaru J, after considering the application, the affidavits, witness statements as well as the submissions filed by the parties, ruled that the respondent had satisfactorily established that she was the wife of the deceased. The learned Judge further held that the respondent was a dependant of the deceased pursuant to **Section 29 (a)** of the Act and that she had established that she was entitled to reasonable provision from the net estate of the deceased. The learned Judge proceeded to order the appellant to make provision for the

respondent for the sum of KShs.50,000,000/=. It is this judgment of Kimaru, J that provoked the appellant to file an application for review of the judgment on the ground that there was a mistake/error apparent on the face of the judgment because the estate of the deceased was not worth the value attributed to it by the learned Judge. The said application was heard by Musyoka, J. The appellant contended that most of the assets listed in the Will of the deceased had been disposed of by the deceased prior to his death and that therefore the estate of the deceased could not afford to pay the respondent the KShs.50,000,000/= as ordered. Upon hearing the application, the trial Judge dismissed the same on the grounds that the appellant had failed to demonstrate that there was an error apparent on the face of the judgment.

5. Aggrieved by the ruling, the appellant preferred this appeal against the entire ruling raising nine grounds of appeal in her memorandum of appeal. Parties filed written submissions in support of their positions and respective counsel highlighted the submissions before us. The appellant submitted that in dismissing her application for review of the judgment, the learned Judge ignored her submissions and adopted the view that there was no error apparent on the face of the record to invoke the provisions of **Order 45 Rule 1 of the Civil Procedure Rules**. The appellant contended that contrary to the wide unfettered discretion afforded to the Judge under Order 45, he took a restrictive approach. She contended that while the learned Judge appreciated that provision should be made from the net estate, he did not bother to first ascertain the net estate before making the award of KShs.50,000,000/=. She further contended that she opposed and controverted the assertion by the respondent that the estate was valued at KShs.1,000,000,000/= and that therefore the onus rested on the respondent to prove that the estate was worth that amount. The appellant argued that contrary to **Section 107 of the Evidence Act**, Kimaru J, shifted the onus of proving the net worth of the estate to her. The appellant submitted that in her application for review she adduced evidence to show that the value of the estate of the deceased was not as high as envisaged by Kimaru, J but Musyoka J, declined to review the judgment after making a finding that there was no error apparent on the record. She asserted that both judges failed to consider her rebuttal in her replying affidavit in which she disputed the alleged value of the deceased estate.

6. The appellant submitted that the evidence she tendered proved that the estate of the deceased was not worth KShs.1,000,000,000/= and this was sufficient reason to review the award of KShs.50,000,000/=. She further submitted that Kimaru, J erred when he ruled that the provision of KShs.50,000,000/= should exclude the claims made by the respondent against the estate of the deceased for \$500,000/= and a debt of \$40,000/= which the respondent had made against the estate of the deceased as the executor of the estate of William Earl Nelson. She argued that that finding went against Section 26 of the Act which provides that a provision can only be made from net assets of the estate. She further argued that if the claims against the estate of the deceased were to succeed, the estate of the deceased would have been diminished further and therefore the Judge erred when he made the provision for KShs.50,000,000/= without ascertaining and deducting the estate's liabilities.

7. The appellant contended that the learned Judge ignored the parameters set out in **Section 28 of the Act** and the Judge did not bother to ascertain the value of the gifts given by the deceased to the respondent. The appellant while relying on the case of **In the Estate of James Karanja alias James Koi (Deceased) 2-14 eKLR**, further contended that the learned Judge ignored the wishes of the deceased and re-wrote the Will.

8. On her part the respondent in opposing the appeal submitted that, in the application for review, the appellant took the position that the court ought to have re-evaluated the evidence tendered in her application to be provided for from the deceased's estates. According to the respondent this would have been tantamount to the court sitting on an appeal of its own judgment. The respondent contended that the application for review was an attempt by the appellant to introduce new evidence to guide the Judge and that it was on the strength of this new evidence that she has filed the appeal. She further contended that it was incumbent upon the appellant to demonstrate to the court that there was an error apparent on the face of the record. She asserted that she provided the court approximate worth of the estate of the deceased; however, the appellant did not give an indication of the value of the estate but only provided the court with a list of assets that had either been sold or were in the joint names of the appellant and the deceased.

9. The respondent submitted that the appellant was appealing the judgment of Kimaru, J under the guise that she was appealing against the ruling of Musyoka, J that dismissed her application for review. While placing reliance on **Chairman Board of Governors Highway Secondary School vs William Mmosi Moi [2007] e KLR**, the respondent argued that the appellant having chosen to apply for review of the judgment she cannot appeal once the review is declined.

10. We have considered the record; respective submissions by learned counsels and the authorities cited by learned counsel and are now at an opportune moment to render our decision. Our mandate on a first appeal is set out in **Rule 29 (1)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in **Selle vs. Associated Motor Boat Company Ltd [1968] EA 123**; that will not interfere unless we are satisfied that the Judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

11. We are of the view that there is only one issue and that is whether the learned Judge took into consideration the value of the estate of the deceased. Section 26 of the Act provides as follows:

***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 dependent, 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.***

12. Section 28 of the Act provides for factors that a court ought to consider before making an order under section 26 as follows:

***"In considering whether any order should be made under this Part, and if so what order, the court shall have regard to –***

***(a) The nature and amount of the deceased's property;***

- (b) *any past, present or future capital or income from any source of the defendant;*
- (c) *the existing and future means and needs of the dependant;*
- (d) *whether the deceased had made any advancement or other gift to the dependant during his lifetime;*
- (e) *the conduct of the dependant in relation to the deceased;*
- (f) *The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;*
- (g) *the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant."*

As can be seen above the nature and extent, that is the value, of the deceased's property is the first consideration. In fact, in the ruling by Musyoka J, he notes that the value of the estate is the most significant factor to consider. However, Kimaru, J in rendering his decision did not consider this critical factor at all. There was no valuation of the estate by a qualified valuer. The learned Judge did not determine the net worth and did not consider the liabilities against the estate as he ought to have done.

The finding by the learned Judge that the deceased left behind a substantial estate is not backed by any cogent evidence.

13. Under Section 26 and Section 28 of the Act, the trial court was also under a duty to take into account any advancement or gift made to the respondent during the lifetime of the deceased, before it can decide whether she had been reasonably provided for. By the respondent's own admission, the deceased had advanced to her some properties including a house and car during his lifetime. The learned Judge stated that these gifts made to the respondent were gifts *inter vivos*, however, given the extent of the property given to the respondent and the value which was not determined by the court, can it be reasonably said that these were gifts *inter vivos* and therefore ought not to be taken into account as provided under Section 26 of the Succession Act?

14. The learned Judge not only imported the word gift *inter vivos* which was not common ground and which had not been contended by the respondent, but should have explained why he deemed the gifts given to the respondent were gifts *inter vivos* as opposed to being advancement made to the respondent during the lifetime of the deceased as contemplated under Section 28 (d) of the Act. Further, the learned Judge *suo motu* said that the gifts given to the respondent were inadequate. This was also imported by the Judge and it was not common ground, neither was it the contention by the respondent. Therefore, we are of the view that there was no sufficient material before the trial court to make the determination that the respondent was entitled to KShs.50,000,000/=. It is not clear how the learned Judge arrived at this figure and why it was awarded to the respondent. The court whilst making provision for a dependant exercises its discretion, which must however, be exercised judicially taking into account the factors provided under section 28 of the Act. In the case of *Ramakant Rai vs. Madan Rai, Cr LJ 2004 SC 36*, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

***"Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:***

***"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".***

15. The deceased left a Will under which he bequeathed property to his legal wife. He did not make provision for the respondent under the Will as a dependant. The respondent contends that she was living with the deceased for 20 years as a customary wife prior to his death, can it then be said that the omission by the deceased to provide for her under the Will was an accidental omission? Or was it that he provided for her during his lifetime and therefore the exclusion was deliberate and was meant to benefit the other beneficiaries? All these important questions had to be determined before section 26 kicks in.

16. In our understanding, a Will is just a legal tool or device for determining the fate of a deceased person's estate after his death. As with every instrument, the court must evaluate it in its natural environment, meaning that primarily the provisions of the law of succession were taken into consideration at the time it was made. It is when we place the Will in its proper context, that we will know how to ask the right questions and those questions will guide the answers we give in the event of a dispute. That is the starting point. Again to put the Will into a proper perspective, it is important to appreciate that the deceased had provided for the respondent during his lifetime and the legal wife after death. The sequence is a reflection of the natural environment of providing, for the heart (alleged customary wife) and mind (the legal wife) is the context and contours of what trial Judge was required to appreciate and determine. Unfortunately the maps and compass were not looked at by the trial court. The trial court was not required to look at the Will as a standalone piece of document without giving much or no attention to the circumstances of the whole dispute. The Will read together with the undisputed conduct of the deceased in first distributing portions of the property to the respondent, constitute a single project of harmonious and integral transaction, which provided for both sides of the coin – a reflection of what the deceased intended.

17. The decision to award the respondent KShs.50,000,000/= was therefore, not based on concrete evidence or did not result from a reasonable inference which could not be displaced by any other evidence. The decision was not based on an objective analysis of the disputes, and the facts available before the trial court could not lead to the conclusion and the only conclusion that the respondent was a dependant as a result of a customary marriage. And the question for us is whether the trial court was entitled to disregard the intention of the

testator. With greatest respect to the learned Judge, it can be said that his decision was arbitrary, unreasonable and had no legal or factual basis. The learned Judge did not consider the clear provisions of section 26 which he was to apply, i.e. the liabilities of the estate, determine the value of the estate, and consider the gifts made to the respondent during the lifetime of the deceased. All these were pertinent and important questions. There was therefore a total misapprehension and misapplication of section 26.

18. These were the issues that were set before Musyoka, J in the application dated the 9th September, 2014. The appellant was entitled to make the application for review in view of the clear misapprehension of Section 26 and Musyoka, J was obligated to address his mind to the clear issues captured in error by Kimaru, J. These were errors and mistakes committed on the face of the judgment and Musyoka, J casually dismissed the grievances of the appellant. Had Musyoka, J addressed his meticulous judicial mind, he would have arrived at the same conclusion as herein. The issues raised by the appellant were errors on the face of the judgment rendered by Kimaru, J. With profound respect Musyoka, J ignored the cry of the appellant for justice which was loud and clear. Again with respect to the learned Judge, there is merit in the grounds of appeal and the submissions made by Mr. Singh learned counsel for the appellant which can only lead to the conclusion that this appeal should be allowed with the consequence that the ruling of Musyoka, J delivered on 25th September, 2015 and the judgment by Kimaru, J delivered on 5th April, 2014 are set aside and substituted with an order, dismissing the judgment of Kimaru, J. delivered on 5th April, 2014 which triggered the present appeal. The appellant shall have the costs of this appeal and in the High Court.

**Dated and Delivered at Nairobi this 9th day of November, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is the*

*True copy of the original.*

**DEPUTY REGISTRAR**