IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 189 OF 2008

JOYCE GAKENIA NG'ARUA.....1ST APPELLANT

PETER MAINA WAWERU.....2ND APPELLANT

AND

ANNE NJAMBI WANJUI.....1ST RESPONDENT

PETER GITAU KIARIE.....2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Rawal, J)

dated 15th November, 2006

in

Succession Cause No. 1871 of 1999)

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JUDGMENT OF THE COURT

James Muiruri Waweru ("*the deceased*") died intestate on 24th July, 1999. It was an accepted fact that he was the biological son of **Peter Maina Waweru** ("*Waweru*") and **Rose Margaret Mwihaki Kiarie** ("*Mwihaki*"), but Waweru and Mwihaki did not marry. Upon the death of the deceased Mwihaki applied for and was granted letters of administration in High Court of Kenya Succession Cause No. 1871 of 1999. In the affidavit in support of that petition she stated, amongst other things, that the deceased was her son and that she was unmarried and ***"--- there is nobody else surviving the deceased ----"*** and ***"--- I am therefore the only surviving beneficiary to the deceased's estate ---".*** Upon learning that Mwihaki had obtained the grant Waweru applied for its revocation. In the affidavit in support of the application to revoke the grant he deponed *inter alia*:

> ***"2. THAT the said ROSE MARGARET MWIHAKI KIARIE falsely and deliberately concealed from the Honourable Court that there were other beneficiaries of the deceased's estate other than herself by fraudulently attesting and affirming that she was the only surviving beneficiary of the deceased's estate whereas the true position is that I am the lawful father and the deceased died leaving two lawful children named Mwihaki Waweru aged 4 years and James Waweru aged 2 years. Annexed hereto is a false and fraudulently sworn affidavit in support of petition for***

letters of administration intestate form P & A 5 marked "PMW 1".

3. THAT the grant was obtained by misleading the Honourable Court that the deceased died intestate without any children as so stated in paragraph 4 of her affidavit dated 25th August, 1999 annexed hereto and marked "PMW – 2".

4. THAT the said ROSE MARGARET MWIHAKI KIARIE is the mother of the deceased and has at no time been married to the applicant herein who is the lawful father of the deceased and is an interested party on behalf of the said deceased's children.

5. THAT after the deceased died I approached the said ROSE MARGARET MWIHAKI KIARIE with a view of collectively attending to the deceased's estate as co-administrators.

6. THAT the said ROSE MARGARET MWIHAKI KIARIE despite giving me assurance that they would act as co-administrators for the benefit of the deceased's children did however without my knowledge or consent commenced probate proceedings culminating in the granting of letters of administration singularly in her favour.

7. THAT I am apprehensive that the letters of administration now granted shall not be used in a manner that would be beneficial to the said children as provided by law as the said grant holder deliberately concealed their existence thereby acting in bad faith.

8. THAT in the interest of the said children who are of tender age now in the care of their mother who was at all material times not married to the deceased the Honourable Court should revoke and declare null and void the letters of administration granted to ROSE MARGARET MWIHAKI KIARIE for reasons cited above in light of the fraudulent manner in which the latter obtained the said letters of administration."

Joyce Gakenia Ngarua ("*Ngarua*") a mother of two minor children who alleged that the deceased was the father of the children also filed objection proceedings against the said grant. Other suits were filed by the parties in other courts but we need not go into them for purposes of this judgment.

In the course of time and as proceedings were ongoing Mwihaki died and **Ann Njambi Wanjui** ("*Njambi*") and **Peter Kiarie** ("*Kiarie*"), respectively the deceased's auntie and uncle were appointed by the High Court to act as administratrix and administrator in her place.

Objection proceedings on the application to revoke the grant took place largely before Koome, J. (as she then was) but were concluded by Rawal, J (as she then was) who in a judgment delivered on 15th November, 2006 did not find merit in the objectors' case and dismissed the cases of the two objectors. It is those findings that have provoked this appeal by Waweru and Ngarua who in a Memorandum of Appeal drawn on their behalf by their advocates fault the learned judge who is said to have erred in law and fact by ignoring and not taking into consideration alleged contradictions and inconsistencies in the claim by Mwihaki that she was the only surviving beneficiary of the deceaseds' estate. The learned judge is also faulted for not finding that Waweru, being the father of the deceased, was entitled under **The Law of Succession Act** to be the administrator of the estate and was more suited to do so than Njambi and Kiarie (auntie and uncle of the deceased). The learned judge is also faulted for not declaring proceedings for substitution of grant undertaken by Njambi and Kiarie a nullity for what the appellants say was a concealment from court of the fact that the deceased had a father who was alive and a step brother, one Edward Kiarie. It is also said as a ground of appeal that the judgment was against the weight of evidence tendered and we hope that we have made a reasonable summary of the grounds some of which appear repetitive while others are not worthy of consideration – there is a ground, for instance, where the appellants fault Rawal, J, for reviewing evidence taken by Koome, J, which attack is misplaced and unmerited as it is the parties who opted for and applied that Rawal, J takes over the matter from the stage left by Koome, J who had been transferred. In another ground the appellants fault the learned judge for not finding that lawyers who represented respondents in final submissions had no authority to do so. This cannot be a ground of appeal as the issue did not arise at all during the proceedings in the High Court and

was not taken before the trial judge and cannot be considered at this stage.

This is a first appeal and it is our duty as a first appellate court to reconsider and re-evaluate the evidence but must remember that we did not hear the evidence or observe the witnesses, an advantage only the trial judge had. On the duty of a first appellate court see the holding in the oft-cited celebrated case of **SELLE AND ANOTHER v. ASSOCIATED MOTOR BOAT** CO. **LTD & OTHERS [1968] EA 123** where it was stated of that duty:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

Ngarua was the first witness. She told the court that she was a mother of two minor children and that although she never got married to the deceased he was the father of those children, the first, Wangechi Gakenia born 2½ years before the deceased died while she was 3 months pregnant when the deceased died, pregnancy which resulted in the birth of Jimmy Muiruri. She named the child Wangechi after her own mother while the boy Muiruri was named after his father the deceased in accordance with their custom. She knew Kiarie and Njambi as uncle and auntie of the deceased and also knew the father and mother of the deceased, Waweru and Mwihaki. Mwihaki visited her at her home when Wangechi was born and Kiarie also paid her a visit. She also testified that she would visit Mwihaki often at her home in Madaraka Estate in Nairobi and that she was surprised, upon the death of the deceased, that Mwihaki had sworn an affidavit where she did not acknowledge the said children Wangechi and Muiruri. She produced various photographs showing the deceased in the company of the said children and others taken at the deceased's funeral and yet others taken at various places showing Mwihaki in the company of her said children. She said:

> ***"--- on the eve of the memorial for** (sic) **one year since the death of James Muiruri Waweru, Margaret Mwihaki called me and told me that she had mentioned my name and the children in the memorial announcement. My name was among those mentioned in the memorial Notice on 23rd August, 2000. I was not surprised. I bought the newspaper to keep the cutting. It is Margaret Mwihaki who took our names to the newspapers and paid for it ----."***

Asked why the deceaseds' name did not appear in birth certificates of the said children she replied that she applied for the certificates when the deceased was already dead and that she therefore did not find it necessary to have the deceaseds' name in the certificates as the father of the children.

Waweru testified that the deceased was his son with Mwihaki but that he never married Mwihaki with whom he had a cordial relationship. He further stated that the deceased was mostly brought up by Mwihaki because he, Waweru, joined the military but that he would send support as a parent including payment of school fees. Further, that after leaving school and after stints of employment, he assisted the deceased to establish a beer and soda distribution business by giving him trucks, drivers and loaders. Upon the death of the deceased he stated that it was he who identified the deceased's body for purposes of post mortem and made funeral arrangements that culminated in the burial of the deceased which took place at Kirangari, the home of Mwihakis' parents. He had never met Ngarua and her children before and first met them at the funeral of the deceased. Of Njambi and Kiarie, who had been appointed in place of Mwihaki upon her death to administer the estate of the deceased he said:

> ***"--- The present administrators are not capable of looking after my son's estate over me the biological father of the deceased. They are not close to the children as I am. The deceased left two children with Joyce Gakenia. My co-applicant is qualified to look after the estate, she has the burden of bringing up the children ----"***

Peter James Kiragu Mwangi, called as a witness for the objectors, testified that he knew Waweru and Mwihaki and that, although they did not marry, they were the parents of the deceased. Upon the death of the deceased, and being a good friend of Waweru and Mwihaki, he chaired funeral meetings and was surprised later to learn that Mwihaki had disowned the deceased's children.

Edward Kiarie a brother of the deceased but younger by 13 years, testified that being the only surviving child of Mwihaki, he was the sole beneficiary of her estate. He denied knowledge of either Waweru or Ngarua who he said he had never met before.

The next witness – Peter Gitau Kiarie, an uncle of the deceased, was one of the administrators appointed by Mwihaki as executor of her will. He testified that the deceased was brought up by his mother and her relatives and not by Waweru at all. Of Waweru's application to be made a co-administrator of the deceaseds' estate he said:

> ***"--- if Peter Maina is made an administrator there would be problem*** *(sic)* ***as he does not recognize Edward Kiarie ----".***

That was the evidence and material that was placed before the learned trial judge who found, firstly, that the application for revocation of grant was not properly before court because, according to the judge, it was barred by **section 30** of the **Law of Succession Act** which bars bringing of applications after a grant of representation has been confirmed. Secondly, the learned judge found that the children Wangechi and Muiruri did not prove that they were children of the deceased. The two objection proceedings were therefore dismissed.

The learned judge found as fact that:

> ***"---- I must point at this juncture that the fact that the 2nd applicant Peter Maina Waweru is the biological father of the deceased is not disputed -------."***

The learned judge found that no evidence had been adduced to prove that the children Wangechi and Muiruri were conceived by the deceased.

When this appeal came for hearing before us on 8th November, 2016 Mr. Kairie, learned counsel for the appellants submitted that the grant issued to Mwihaki was based on fraud in that there was concealment of facts by the deponent of an affidavit, who, according to learned counsel, concealed from court that the deceased was survived by 2 children and also by a father and step brother. Counsel referred to **section 76** of the **Law of Succession Act** which sets out grounds on which a grant may be revoked and urged us to hold that the grant should have been revoked.

Miss Ndegwa, learned counsel for the respondents, in opposing the appeal, denied that there was concealment of any facts from the trial court. According to learned counsel, Waweru, father of the deceased, had disappeared a long time ago and only reappeared when the deceased mother (Mwihaki) died. Learned counsel further submitted that paternity of the children Wangechi and Muiruri had not been proved and for all these we should dismiss the appeal.

We have considered the record of appeal, submissions made and the law and have taken the following view of this appeal.

Section 39 of the **Law of Succession Act** on ***"where intestate has left no surviving spouse or children"*** provides that:

> ***"39 (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-***
>
> ***(a) father; or if dead***

(b) mother, or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half -brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares."

It was not in dispute and the learned judge found as fact that Waweru was the biological father of the deceased, a child he got with Mwihaki, a woman he did not marry. When the deceased died his mother Mwihaki applied to the High Court for grant of letters of administration in respect of that estate and in the affidavit sworn on 25th August, 1999 Mwihaki deponed *int*

***"1. ----inter alia*:**

2. That the deceased was my son.

3. That I am not married and therefore there is nobody else surviving the deceased.

4. That at the time of his death on 24th July, 1999 the deceased was not married neither did he have any children.

5. That I am therefore the only surviving beneficiary to the deceased's estate

6. -----"

Ngarua testified before the trial court that although she did not get married to the deceased he – the deceased – introduced her to his mother Mwihaki and other relatives and that the families visited each others' homes often. Further, that upon the death of the deceased Mwihaki even assisted her by giving her money for the upkeep of the minor children. Peter Gitau Kiarie, an uncle of the deceased stated in evidence amongst other things that he knew that Waweru was the deceaseds' father with his sister Mwihaki but that Waweru then joined the army and disappeared for a long period of time. When Mwihaki made the application for grant of letters of administration, and in stating that she was the only surviving relative of the deceased, she misled the court because she knew that Waweru, with whom she begat the deceased, was alive and well. She had also recognized the two children Wangechi and Muiruri whose home she visited and even offered financial assistance upon the demise of her son the deceased.

All these facts and evidence placed before the trial judge were sufficient, on a balance of probabilities, to show that Waweru was the father of the deceased and that the deceased was also survived by the two children, one born 2½ years before the death of the deceased while Ngarua was 3 months pregnant when the deceased died. The pregnancy resulted in the birth of a baby son who Ngarua decided to name after the deceased as is their custom.

We are of the respectful opinion that by rejecting all this evidence the learned judge placed too high a standard for establishing that Wangechi and Muiruri were the children of the deceased. There were many photographs taken of the deceased and his daughter Wangechi with Ngarua during birthday commemorations and other functions which showed that the deceased took Wangechi as his daughter. When the deceased died Ngarua participated in funeral arrangements with Waweru, Mwihaki and others and openly attended the burial at Kirangari. After this there was evidence that Mwihaki communicated with Ngarua and even offered her financial accommodation. When asked why birth certificates did not bear a father's name Ngarua replied that she had obtained birth certificates for the children after the deceased had died and she did not in the premises find it necessary to include a father's name when that father was already dead. This, to our mind, was a reasonable explanation.

Having found that Mwihaki concealed important and fundamental facts when applying for grant of letters of administration and having faulted the learned judge for not finding that Waweru, as father of the deceased, was the nearest with Mwihaki as kindred of the deceased, we do not need to go into other grounds of appeal as that exercise would not be necessary or add any value to this judgment. The learned judge, who had found as fact that Waweru was the father of the deceased erred in finding that Waweru should not have been an administrator or co-administrator of the deceased. Waweru was, with Mwihaki, the nearest kindred of the deceased as defined by the **Law of Succession Act** and was entitled to be involved in the administration of the deceased estate. Further, the learned judge erred, on the material placed before her, in placing too high a standard to show that the deceased had recognized that the child Wangechi, and by extension, Muiruri, as his children. The many photographs produced were evidence enough to show many moments that the deceased shared with his daughter Wangechi. Being minor children under the care of their mother Ngarua, the learned judge should have found that Ngarua was a fit and proper person to take care of the interests of the said children.

In the end we allow this appeal by setting aside the judgment delivered on 15th November, 2006. In the circumstances of this appeal we think that the proper order to make is that the appellants and the respondents jointly administer the estate of the deceased. This being a family dispute let each party meet their costs.

DELIVERED and DATED at NAIROBI this 20th day of January,2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. AZANGALALA

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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