



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI JJ.A)

CIVIL APPEAL NO. 128 OF 2016

BETWEEN

R N K.....APPELLANT

AND

C N N.....RESPONDENT

(Being an appeal from judgement of the High Court at Nairobi of (Musyoka J). dated 21st March, 2014

in

Family Division Succession Cause No. 2071of 2011

JUDGMENT OF THE COURT

This appeal is against the judgment of Musyoka, J. delivered on 21st March, 2014. The undisputed facts of this appeal are that on 24th May, 1980, the appellant, **RN K (R)** married **P M K** (deceased) who died on 30th November, 2009. The two were blessed with two children, namely **D A K M (A)** and **B J G M (B)**. However, the marriage between the two was dissolved and decree absolute issued on 22nd June, 1994.

By a petition dated 1st November, 2011, Catherine petitioned for a special limited grant of letters of administration *ad colligenda bona* under **Section 67(1)** of the Laws of Succession Act to enable her access Ksh.10,000,000/= from the deceased's estate to meet the deceased's children's expenses. On 7th November, 2011 the petition came before Maraga, J (as he then was) and the learned judge directed that C applies for a full grant before the limited grant was considered. Catherine complied with the Court's directive by petitioning for letters of administration intestate in respect of the estate of the deceased. Her co-petitioner was her daughter, C. In the petition, C, C and P were named as the only beneficiaries of the estate. At the time, C used the legal services of the firm of Mereka and Co. Advocates.

On learning of the petition by C and C for letters of administration of the estate of the deceased, R together with her son A, filed an objection on 24th April, 2012 to the making of a grant of representation of the deceased's estate to C and C. Simultaneously with the filing of the objection, the duo cross-petitioned for letters of administration in respect of the deceased's estate in their capacities as wife and

son of the deceased respectively. In a petition dated 24th April, 2012 R and her son further petitioned for a special limited grant seeking to access to Ksh.10,000,000/= from the deceased's estate so as to put them at par with C who had accessed Ksh.10M from the deceased's estate.

As the parties failed to agree on the mode of distribution, Musyoka J. after considering the parties written submissions delivered a ruling dated 21st March, 2012. In his ruling, the learned judge directed that the sum of Ksh32,989,183.00 be shared equally between the deceased's four children and C. He further directed that in the sharing, the Ksh.10,000,000/- withdrawn by Catherine was to be taken into account and C's share and that of her two children was to be reduced by this figure. R was aggrieved by the outcome of the Musyoka's, J. ruling and hence this appeal.

In opposing the appeal, Ms. Irungu, learned counsel for Catherine urged us to find that the fees of Ksh.4,385,000/- paid to M/s. Mereke should be a charge on the estate of the deceased as provided under **S.83(c)** of the Law of Succession Act; that R was not a dependant of the deceased and neither was she a wife as defined under **S.3** of the Law of Succession Act and finally, that Rose's appointment as a co-administrator was for purposes of protecting the interests of her two children and not on account of her being a beneficiary.

We have considered the record, the oral and written submissions made before us, the authorities cited and the law. This being a first appeal, we are obligated to re-assess and re-analyze the evidence tendered in the lower court in line with the principles as set out in the case of **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY [1968] EA 123**. Similarly in **SUMARIA & ANOTHER VERSUS ALLIED INDUSTRIES LIMITED [2007] KLR** this court held, *inter alia*:-

The facts of this case are fairly straight forward and the capacities of the parties (save C's) is also not disputed. R married the deceased on 24 May, 1980 and the marriage was blessed with two children, A and B. Subsequently, the deceased and R divorced and a decree absolute issued on 22nd June, 1994. It is also not disputed that C had two children with the deceased, namely, C and P.

The learned trial Judge aptly summed up Catherine's concealment as follows:-

As regards R's status of a divorcee vis-à-vis the inheritance of the deceased's estate, the learned Judge, again, rightly in our view, summed up her position as follows:-

A divorced spouse though can access the intestate estate of her former husband if she moved the court under Section 26 of the Act for the court to appoint (sic) a share in her favour. The definition of dependents, that is the persons entitled to move the court under section 26 of the Law of Succession Act, is given in Section 29 of the Act. It classifies former spouses as dependents. R N ought to have taken advantage of this provision before shifting her claim in the estate. Since she has not moved the court under section 26 of the Act, she had no stake whatsoever in the estate.

What about the status of Catherine? Although there was an attempt by R to deny that Catherine was a wife to the deceased, we note that in R's affidavit in support of petition by way of cross-application for grant dated 23rd April 2012, R named C as the deceased's widow. In view of this averment, R cannot therefore be heard to be saying that it was not proved that Catherine was the deceased's wife.

“Subject to the provisions of section 40 where an intestate has left one surviving spouse and a child or children the surviving spouse shall be entitled to

(b) A life interest on the whole residue of the net intestate estate”

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.”

“Under section 40 of the Act if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where section 35 of the Act would be put into effect, so that if there was surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of section 38 of the Law of Succession Act, children would divide the estate equally amongst themselves.”

i.	<u>Allan</u>	<u>and</u>	<u>Brian</u>	
Sum withdrawn by C -				Kshs.10,000,000.00
Add sum paid to M/s Mereka & Co				Kshs. 4,325,000.50
Add ½ of 18,664,183.00				Kshs. 9,332,091.50
Total				Kshs. 23,657,091.50

ii. Cynthia and Philip

However, the above distribution does not bring this matter to a close.

“As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in Section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to strictly apply the rule on life interest to temper with it in the interest of justice of all affected parties. In the circumstances of this case having found that the principle in Section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow N a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased’s estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow N as opposed to a life interest.”

Accordingly, Catherine’s house shareholding shall be as follows:

From the record, the sum of Kshs. 32,989,183.00 is invested in an interest earning account in the names of counsel representing the two parties. The interest thereon shall be distributed on a pro rata basis based on the above distribution. Finally, this being a family matter, we deem it fit that each party shall bear his/her own costs.

Dated and delivered at Nairobi this 22nd day of September, 2017.

G.B.M KARIUKI

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JUDGE OF APPEAL

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F. SICHALE

JUDGE OF APPEAL

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S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

DEPUTY REGISTRAR