



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GATEMBU, MURGOR & SICHALE, JJ.A)

CIVIL APPEAL NO. 377 OF 2014

BETWEEN

DAVID BROWN KIPKORIR CHEBII APPELLANT

AND

RAEL CHEBII RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret, (Hon. A. Mshila, J.) dated 23/03/2012

in

H.C. P&A NO. 137 OF 1990)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (A. Mshila, J.) delivered at Eldoret on 23rd March 2012 revoking, under Section 76 of the Law of Succession Act, a grant of letters of administration in respect of the estate of Chebii Kimang’et, deceased, issued to the appellant on the basis that the same had been obtained by concealment of material facts.

Background

2. Chebii Kimang’et, deceased, died intestate on 16th May 1983. His son David Brown Kipkorir Chebii, the appellant successfully petitioned for letters of administration intestate of the deceased’s estate in the High Court in Eldoret in Succession Cause No. 70 of 1990. In his affidavit in support of that petition, the appellant indicated that the deceased’s only asset that was Plot 280 Elgeyo Border Scheme measuring approximately 9.5 hectares. As for the beneficiaries, he named Kobilo Chebii, deceased, the widow of the deceased; himself as a son of the deceased; Philip Kigen Man’get as a son of the deceased; and Rael J. Chebii, the respondent herein who he described as a “relative.”

3. The High Court at Eldoret issued the grant of letters of administration to the appellant on 6th February 1991. On 5th March 1992 the court issued a certificate of confirmation of grant naming the appellant as sole heir of the property Plot 280 Elgeyo Border Scheme. On 23rd March 1992 a Transfer by personal representative in respect of the property by which the appellant, as the administrator of the estate of the

deceased, transferred the property to himself as the beneficiary. Thereafter the appellant subdivided the property into three portions and Title Numbers Sergot/Elgeyo Border Settlement Scheme/ 465, 467 and 468 were issued to him.

4. By a Summons for Revocation or Annulment of grant dated 5th May 2004 the respondent applied to the High Court at Eldoret for the revocation or annulment of the grant issued to the appellant on 6th February 1991 and confirmed on 5th March 1992. That application was based on the grounds that the appellant obtained the grant fraudulently by making false statement or by concealing material facts; that the appellant did not name all the dependants of the deceased; that the respondent was married to the deceased; that the appellant had mismanaged the estate and transferred the same exclusively to himself. The respondent supported the application with an affidavit in which she deposed that she was married to the deceased under Keiyo customs in 1979 and that the appellant omitted the names of dependants of the deceased in his petition for grant of letters of administration.

5. The appellant opposed the summons. In his replying affidavit he deposed that the respondent was not married to the deceased; that the respondent was a maid hired to attend to the deceased in his old age; that in appreciation and as a gesture of thanksgiving, the deceased's relatives had agreed that she be given 2 acres out of the property.

6. Oral hearing was conducted in respect of the respondent's application. The hearing commenced before G. Dulu, J. It was taken over by Ibrahim, J (as he then was) and finally concluded by A. Mshila, J who delivered the impugned judgment on 23rd March 2012.

7. In that judgment, the court found as a fact that the respondent was a wife to the deceased and a dependant; that the appellant had failed to disclose this fact in his petition for grant of letters of administration of the estate of the deceased; that the appellant had also failed to disclose to the court other dependants and beneficiaries of the deceased, namely children of the deceased including the appellant's sisters.

8. Accordingly, the court allowed the respondent's application and ordered the revocation of the grant issued to the appellant and for a fresh grant to be issued in the joint names of the appellant and the respondent. As regards distribution of the estate, the court granted the joint administrators 45 days to reach "consensus as to the method of distribution of the estate" failing which either party was at liberty to apply to the court for confirmation of the joint grant and for the distribution of the estate.

9. Aggrieved, the appellant lodged the present appeal.

The appeal and submissions by counsel

10. Learned counsel for the appellant, Mr. Chebii, referred us to the memorandum of appeal and submitted that the holding by the Judge that the respondent was a wife of the deceased was not supported by credible evidence; that an agreement produced by the respondent as evidence of her marriage was not authentic; that there was evidence that the children that the respondent claimed to be dependants of the deceased were not sired by the deceased; that there was no evidence that the deceased adopted those children for them to qualify as dependants; and that there was no basis for the court to revoke the grant issued to the appellant.

11. Opposing the appeal, learned counsel for the respondent, Mr. Songok, submitted that the appeal is premature; that all the court did was to revoke the grant issued to the appellant and re-issue it in the joint names of the appellant and the respondent; that the estate of the deceased is yet to be distributed and the appellant should wait for the confirmation of the joint grant and for the distribution of the estate. According to Mr. Songok, the finding by the Judge that the respondent is a widow of the deceased is well supported by the evidence and urged us to dismiss the appeal.

Review and analysis

12. We have considered the appeal and the submissions by counsel. The question for determination is whether the finding by the Judge that the appellant obtained the grant of letters of administration of the estate of the deceased by concealment of material facts is well founded.

13. In addressing that question, we are entitled to review the evidence and to draw our own conclusions. [See **Selle v Associated Motor Boat Co Ltd [1968] EA 123**]. We are also mindful that the learned Judge was dealing with an application under Section 76 of the Law of Succession Act that involved exercise of judicial discretion. As an appellate court, we can only interfere with the exercise of discretion if satisfied that the judge misdirected herself in law or that she misapprehended the facts or that she took into account extraneous considerations or that she failed to take into account relevant considerations or that her decision is plainly wrong. In **Mbogo & Another vs. Shah [1968] E.A. 93** at page 96, Sir Charles Newbold P. stated:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

14. What then was the material before the Judge on the basis of which she concluded that the appellant had obtained the grant of letters of administration by concealment of material facts?

15. The respondent testified that following negotiations, she got married to the deceased in 1979 under Keiyo customs and that her husband paid bride price comprising of four cows to her father; that she started living on the property with the deceased thereafter as husband and wife until his death in March 1983; that she already had two children, namely Kiplagat and Kipketer, by the time she got married to the deceased who took them into his family as his own; and that she had three children with the deceased, namely Kipkokei, Cherotich and Kipkemboi born in 1981, 1983 and 1985 respectively. She however conceded that Kipkemboi was born well after the death of the deceased. She denied that she was employed as a helper to the deceased. In her view, as the wife of the deceased, and considering the deceased had a wife before her who died and was survived by children, the property should be divided equally between the houses of the deceased’s widow and her house.

16. The respondent’s father, Malakwen Barno stated in his evidence that the deceased, a widower at the time, married his daughter in 1979 following negotiations at which a bride price of 4 cows was agreed upon; that as his daughter had young children, the deceased embraced them as his own. He produced a picture taken in Eldoret capturing the respondent’s mother, himself, the deceased and the children in support of his testimony. He stated that the agreement was reduced into writing and that his son, Musa Chepkwony drew up the written agreement. He denied that the respondent was the deceased’s maid stating that the deceased did in fact build a house for the respondent on the property.

17. Kimengich Chesoo stated that he was the deceased’s neighbour for about 30 years; that the deceased married the respondent in 1979; that the deceased and the respondent lived together; that the respondent used to cook for them and she looked after the deceased when he was sick; that the deceased looked after the respondent’s children. According to him, the respondent *“came to the house as a wife not a servant.”*

18. Phillip Kimitei Mutai, a village elder stated that he was a neighbour to the deceased for 20 years until his death in 1983; that although he did not know when the deceased’s first wife died, the deceased married the respondent in 1979; that she had 2 children when she married the deceased and got 3 other children thereafter all of whom live on the deceased’s property.

19. The appellant testified that after the death of the deceased in 1983, he applied for, and was issued with grant letters of administration in respect of the estate of the deceased; that upon confirmation of the grant the property, which is about 23 acres, was given to him as an administrator; that he paid outstanding dues to Settlement Fund Trustees; that he gave himself 11 acres of the property; was willing to give 2 acres of the property to the respondent, and the balance to his brother Phillip Kigen Man’get. That in accordance

with Keiyo customs, his sisters who were all married were not entitled to the property. He went on to say that the respondent “came seeking employment” at their home in 1979 and “*came with two sons to our home*”; that she helped for a few months before leaving in 1981; that she had given birth to a 3rd child, Kipkosgey in 1981 but asserted he was not the child of the deceased; that the 4th child was born in June 1984 and the last born, Kipkemboi, was born in 1991 and the deceased could not be the father.

20. He went on to say that the property was subdivided into three portions measuring 3.74, 4.15 and 1.121 hectares and registered in his name as title numbers Sergoit/Elgeyo Border Settlement Scheme/ 465, 466 and 467 respectively. He offered to give the respondent 467.

21. In his testimony, the appellant’s cousin, Phillip Kipkemboi Chirchir, asserted that the deceased had only one wife, Kobilu who was deceased. That the deceased had informed him that the respondent “had gone to look for employment and he employed her to work as househelp” “to cook food and wash clothes.” He maintained that the deceased did not have children with the respondent; that although he saw the respondent at the funeral, she was not introduced and “was just an attendee not a wife of deceased.”

22. The appellant’s last witness was his neighbour James Kiplagat Kimaiyo who stated that the deceased had “only one (1) wife” called Kobilu; that the deceased did not have any other children other than those he bore with the appellant’s mother, Kobilu. According to him, the respondent used to look for work at the Centre and later went to work for the deceased; that she came with three children, had two more thereafter and the latter was born after the death of the deceased in 1983; and that the respondent “was an employee of the deceased” although he was not there when she was employed and neither did he know “her salary/remuneration.”

23. After reviewing the evidence, the learned Judge found as a fact that the respondent was a wife to the deceased and a dependant during his lifetime and that the appellant had failed to disclose that fact to the court.

24. In our view, that finding was well supported by the evidence presented before the court. As the learned Judge observed, the appellant swore an affidavit in support of the petition for the letters of administration in which he deposed that respondent was one of the beneficiaries left behind by the deceased. In that affidavit, the appellant described the respondent as a “relative” of the deceased. The appellant’s subsequent claim during the hearing that the respondent was an “employee” or a “maid” was rejected on sound basis. There was also material before the court that the respondent was sometimes after the death of the deceased being called upon to contribute to liabilities attaching to the property. It is inconceivable that an “employee” or a “maid” would be called upon to take on such responsibility if indeed that was the status of the respondent. We think the learned Judge had good reason to reject the testimony by the appellant and his witnesses regarding the status of the respondent, in relation to the deceased. That testimony comes across as choreographed.

25. As regards the respondent’s children, the preponderance of evidence was that prior to moving in to live with the deceased in 1979, the respondent had two children. The appellant himself acknowledged in his evidence that the respondent ‘came with’ two children. It was not seriously contested that between 1979 and the time the deceased died in 1983, the respondent bore two more children namely, Ezekiel Chebii and Philemon Kipkosgey. In light of the evidence therefore, the finding by the learned Judge that appellant failed to disclose to the court while petitioning for the grant of letters of administration that Kiplagat, Kipketer, Ezekiel Chebii and Philemon Kipkosgei were dependants and beneficiaries of the estate of the deceased cannot also be faulted.

Disposal

26. We are satisfied that the order revoking the grant of letters of administration issued to the appellant and the order for a fresh grant of letters of administration to be issued in the joint names of the appellant and the respondent is well founded. We have no basis for interfering with it. We also think and hold that the Judge was right to defer the question of the distribution of the estate of the deceased until such time that an application for confirmation of the joint grant of letters of administration is made. The result is

that the appeal is devoid of merit. It is dismissed with costs.

Orders accordingly.

Dated and delivered at Eldoret this 29th day of July, 2016.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR