



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI J.J.A)

CIVIL APPEAL NO. 24 OF 2013

BETWEEN

ALICE SEBI MINAYO APPELLANT

AND

MARY GRACE AYUGU RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 29th May, 2013 in H.C. SUCCESSION CAUSE .NO. 133 OF 2010)

JUDGMENT OF THE COURT

- BENARD KARANI AYUGU** (the deceased) died on 12th October, 2009. On 26th February, 2010, **Mary Grace Ayugu** (the respondent) petitioned the High Court at Kakamega for a grant of letters of administration intestate. On 6th April, 2010, **Alice Sebi Minayo** (the appellant) filed an objection to the grant to the respondent of letters of administrations the sole administratrix of the deceased's estate and cross-petitioned to jointly administer the estate with the respondent. Her objection was based on the ground that she was the 2nd wife of the deceased and that the respondent had, in her said petition, refused to include her and her children as beneficiaries of the deceased's estate; She therefore sought an order that as the second wife of the deceased she should jointly administer the estate with the respondent.
- Pursuant to the direction taken in that cause, Chitembwe, J. heard the objection proceedings by *viva voce* evidence. In his judgment delivered on 29th May, 2013, the learned Judge held that the appellant was not a legal wife but a dependant of the deceased; that the deceased had not adopted the appellant's children and that they were therefore not his dependants; and that the respondent was the legal wife of the deceased entitled to a grant of letters of administration to administer his estate. The learned Judge also found that the appellant was not entitled to continue occupying the deceased's property situate at Moi's Bridge in Trans Nzoia District and known as **Title No. Nzoia/Moi's Bridge/Block 1/1727** (the suit property) and ordered her immediate eviction therefrom.
- Aggrieved by that decision, on 31st May, 2013 the appellant filed a Notice of Appeal evincing her desire to appeal against the whole decision. However, on 27th July, 2013 she filed the present appeal limiting her complaints to and faulting the learned Judge for ordering her eviction from the suit property and finding that her children were not dependants of the deceased.

4. On 27th August, 2014, slightly over a year later, the respondent filed a Notice of Cross Appeal and challenged the learned Judge's finding that the appellant was a dependant of the deceased within the meaning of **Section 29** of the Law of Succession Act.
5. Presenting the appeal before us, Mr. Osango, learned counsel for the appellant, submitted that the learned Judge erred in prematurely ordering the appellant's eviction from the suit property. He also faulted the learned Judge for finding that the appellant had sold vehicles belonging to the deceased when there was no evidence before the court that the deceased owned any motor vehicles. He further faulted the learned Judge for finding that the appellant's children were not dependants of deceased. He therefore urged us to allow the appeal to facilitate the hearing of an application for distribution of the estate of the deceased.
6. Opposing the appeal, Mr. Indimuli, learned counsel for the respondent, submitted that the central issue in the administration cause was the sharing out of the deceased's estate which the appellant was wasting. In his view therefore, the learned Judge cannot be faulted for taking a global view of the matter and ordering the appellant's eviction from the suit piece of land. He therefore urged us to find that this appeal has no merit and accordingly dismiss it with costs to the respondent.
7. We have considered the matter. **Rule 93** of the Court of Appeal Rules requires any respondent desirous of contending that the decision appealed against or any part thereof should be varied or reversed to file a notice of cross-appeal within **thirty** days of service of the memorandum or record of appeal, whichever is later. The respondent's notice of cross appeal in this matter having admittedly been filed out of time without leave, we find it incompetent and accordingly strike it out.
8. On the merits of the appeal itself, we are in total agreement with counsel for the appellant that the learned Judge decided an issue that was not before him. A grant of letters of administration had not been made. What was before the Judge was the appellant's objection to the grant of letters of administration being made to the respondent solely and a cross petition for the same to be made to both the appellant and respondent. Having decided that it was the respondent who was entitled to solely administer the estate of the deceased, the learned Judge should have stopped here and asked the respondent to file and serve the appellant and all the other beneficiaries of the deceased's estate with an application for distribution of the estate. In the circumstances we agree with counsel for the appellant that the learned Judge erred in ordering the appellant's eviction from the suit property.
9. Mr. Osango also faulted the learned Judge for finding that the appellant's children were not dependants of the deceased. As the learned trial Judge quite correctly found, the appellant's children were, even at the time of hearing the objection proceedings, adults. As they took no part in the objection proceedings and are not parties to this appeal, we find no merit in the appellant's ground challenging the learned Judge's holding that they were not dependents of the deceased and hereby accordingly dismiss it.
10. For these reasons we allow this appeal in part, set-aside the learned Judge's order directing the eviction of the appellant from the suit property and direct the respondent to apply and serve upon the appellant an application for the distribution of the deceased's estate.
11. Until the determination of that application and a finding being made as to who is entitled to the suit property the appellant shall continue residing thereon. This being a family dispute we order that each party bears its own costs.

DATED and Delivered at Kisumu this 3rd day of March 2015.

D.K.MARAGA

JUDGE OF APPEAL

F.AZANGALALA

JUDGE OF APPEAL

S.Ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR