IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & GATEMBU JJA.)

CIVIL APPEAL NO. 19 OF 2013

BETWEEN

JANET WANJIKU WAWERU ……..…….…….. APPELLANT

AND

TERESIA NJERI KIMANI ……. RESPONDENT

(Appeal from the judgment/order of the High Court of Kenya at Nairobi (Koome, J.) dated 18th March, 2005

in

SUCCESSION CAUSE NO. 1618 OF 1996)

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JUDGMENT OF THE COURT

At the hearing of this appeal **Mr. Gathua**, learned counsel holding brief for **Mr. Burugu** for Janet Wanjiku Waweru (the appellant) made an application for an adjournment, which we rejected. He is from the same law firm that is on record for the appellant and it did sound ill for him to state that they had not prepared for the hearing of so old an appeal. Moreover, there was no appearance for the respondent, though served. Upon failing to secure an adjournment, counsel by way of urging the appeal literally threw in the towel and left it to the Court by simply stating; ***"Mr. Burugu is relying entirely on the record of appeal and prays for judgment on that basis."***

We take a dim view of counsel who exhibit a cavalier attitude towards court business. Industry and preparedness are some of the cardinal attributes that advocates must possess, cultivate and practice if they are to be true to their calling and render faithful service to their clients and to the Court, whose officers they are.

What does the record turn up?

The appeal arose from the 'judgment' of the High Court (Koome, J., as she then was) delivered on 18th March 2005 by which she dismissed the appellant's summons for revocation or annulment of the grant of letters of administration issued on 16th October 1998 to Teresia Njeri Kimani (the respondent). The letters were in respect of the estate of the late Rahab Muthoni Waweru (the deceased) who died on 9th June

1992. The deceased, the respondent and the appellant were all co-wives of one Waweru.

The respondent had petitioned for letters of administration with the consent of her own sisters while citations to accept or refuse letters of administration intestate were issued to and served on various persons including the appellant, without objection being raised. Accordingly, the respondent received the granted letters on 15th April 1997 and the same were confirmed on 16th October 1998. This was after a consent letter was filed on that date to the effect that some properties forming the estate of the deceased would be registered in the respective names of the respondent and the appellant on behalf of their respective houses, the deceased having had no children of her own.

The appellant's application was premised on the grounds that;

"(1) The proceedings leading to the grant were defective in substance.

2. ***The grant was obtained fraudulently by false statement or concealment of something material.***

3. ***The grant was obtained by means of untrue allegations of fact essential on point of law to justify grant."***

There were affidavits and counter-affidavits filed. The consent of 16th October 1998 proving material, the parties agreed that it be submitted to the Divisional Criminal Investigations Officer to determine the authenticity of the fingerprint therein purporting to be the appellant's, but which she now disputed and repudiated as a forgery. In a report dated 25th November 2003 by one Joseph L. Chogo on behalf the Principal Criminal Registrar, the result of examination was that the thumb print appearing on the consent in question was identical to the known right thumb print of Janet Wanjiru Waweru, the appellant.

Notwithstanding that the said report was obtained by agreement of both parties, the appellant, apparently unhappy with it, sought a second opinion from a private firm known as Hawk Eye Technology. By a letter dated 14th April 2004 the said firm returned the finding that the photocopy of the questioned print did not *"show minimum required number of ridge characteristics to establish identity beyond reasonable doubt."* Emboldened by this, the appellant's counsel urged the trial court to find that the alleged consent was a forgery.

Other than the alleged forgery, the appellant sought the revocation of the grant on the basis of a number of technical points including that the respondent was not indicated to be holding the property distributed to her in trust for her sisters, and that the appellant's name was rendered as Wanjiru Waweru yet her full names are Janet Wanjiku Waweru.

After hearing the appellant and the respondent, the learned judge dismissed the application for annulment and revocation. She was satisfied that the appellant had indeed signed the consent letter and was unmoved by the finding by Hawk Eye, who relied on a photocopy while the CID had examined the original. She preferred the opinion of the latter. The learned judge found that the appellant's grouse about her names lay in rectification and not in nullification as she sought, and rejected as far-fetched the belated allegation that the deceased had left a will.

The memorandum of appeal challenges each of the learned judge's findings aforesaid as being erroneous in point of fact and law. As a first appellate court, our duty is to re-evaluate and analyze afresh the entire evidence on record so as to draw our own inferences of fact and reach our own independent conclusions. We do so mindful that we have not had the advantage, available to the trial court, of hearing and observing witnesses as they testified. We therefore make due allowance for that fact and are generally slow to upset findings of fact unless they be based on no evidence, are erroneous conclusions from the evidence based on wrong principles, or are plainly wrong in the entire circumstances of the case. See **PETERS Vs. SUNDAY POST LTD** [1958] EA 424 and **SUSAN MUNYI Vs. KESHAR SHIANI** [2013] e KLR.

Having undertaken that task, and bearing those principles in mind, we are not persuaded that any basis has been made to justify our interference with the learned judge's findings and conclusions. We are satisfied on the evidence on record that the appellant did, in fact, execute the consent dated 16th October 1998 and there is mischief in her purporting to repudiate it. The report by the document examiner tendered by the Criminal Investigation Department was properly preferred over the one by Hawk Eye Technologies which, apart from being ambivalent in its conclusions was, moreover, based on an examination of a photocopy as opposed to the original of the consent in question. The other complaints such as the manner in which the appellant's names appeared in the confirmed grant were of little moment given the respondent's explanation that those are the names by which the appellant was known. In any event, it was not sufficient to justify a revocation or annulment of the grant.

Like the learned judge, we find that the appellant's revelation about the existence of a will more than a decade after the demise of the deceased was an afterthought. There had been time enough for the appellant to petition for probate on the basis of the alleged will but she did not. It cannot conduce to the doing of justice in the circumstances of this case for this Court to disturb a grant made and confirmed so long ago and on the basis of which beneficiaries, including the appellant, had already acquired proprietory rights. The appellant was guilty of unexplained and inordinate delay and the learned judge was wholly justified in dismissing the application before her. We shall not disturb her findings.

In the result, this appeal is wholly without merit and is dismissed. As the respondent did not appear at the hearing of the appeal despite service, we make no order as to costs.

Dated and delivered at Nairobi this 22nd day of May, 2015.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/mwn