



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 60 OF 2014

BETWEEN

SISILIA MWIKALI KIRWA APPELLANT

AND

H C 1ST RESPONDENT

JAMES KIPROTICH 2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Hon. Chitembwe, J.) dated 20th March, 2014

in

H.C. SUCC. CAUSE NO. 25 OF 2009)

JUDGMENT OF THE COURT

1. This is an appeal from the decision of the High Court of Kenya at Kakamega (S. J. Chitembwe, J.) given on 20th March 2014 revoking the grant of Letters of Administration Intestate issued to the appellant with respect to the estate of Leah Chesongony Cheruiyot, the deceased.

Background

2. Leah Chesongony Cheruiyot, (the deceased), died on 20th May 1992 aged 68 years. About 17 years later, her daughter in law Sisilia Mwikali Kirwa, also referred to by the name Cecilia (Sisilia) petitioned the High Court at Kakamega in Succession Cause No. 25 of 2009 for grant of Letters of Administration intestate of the estate of the deceased. In the affidavit in support of the petition in which she described her relationship to the deceased as “widow”, Sisilia set out the following persons as surviving the deceased:-

(a) *Sisilia Mwikali Kirwa* - *Daughter*

(b) *Kiprotich James Sironei* - *Grand son*

- (c) Elizabeth Chepkoech - Grand daughter
- (d) Isaack Matheka - Grand son
- (e) Mbeke Hilton Cheti - Grand daughter
- (f) Ann Chepchumba - Grand daughter
- (g) Magdaline Chemeli Osewe Grand daughter
- (h) Timothy Makau - Grand son
- (i) Nahashon Ndeto - Grand son
- (j) Thomas Nduva - Grand son
- (k) H C - Daughter
- (l) John Kipkemoi Kirwa - Grandson

3. In the petition, Sisilia disclosed a property known as L. P. Kakamega/Sergoit/312 as the only asset of the deceased at the time of her death.
4. Grant of Letters of Administration Intestate was issued to Sisilia by the court on 27th March 2009 and Certificate of Confirmation of Grant issued to her on 16th November 2010 by which the property Kakamega/Sergoit/312 was to be distributed as follows;-

NAME DESCRIPTION OF PROPERTY SHARES OF HEIRS

KAKAMEGA/SERGOIT/312

Sisilia Mwikali Kirwa	“	“	3.8 Acres
Kiprotich James Sirorei	“	“	5 Acres
Elizabeth Chepkoech	“	“	2 Acres
Magdaline Chemeli Osewe	“	“	2 Acres
Isaack Matheka	“	“	5 Acres
Mbeke Hilton Cheti	“	“	2 Acres
Timothy Makau	“	“	5 Acres
Ann Chepchumba	“	“	2 Acres
Nahashon Ndeto	“	“	5 Acres
Thomas Nduva	“	“	5 Acres
H C	“	“	3 Acres
John Kipkemboi Kirwa	“	“	5 Acres

5. By an application dated 4th March 2011 presented to the court under certificate of urgency, the respondents as objectors applied for revocation and or annulment of the grant of Letters of Administration intestate issued by the court to Sisilia on the grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained and confirmed fraudulently by making of a false statement and or concealment of material facts, namely that the deceased died testate having left a valid Will that clearly set out the deceased's wishes; that the deceased left behind three children, namely the respondents and one David Kirwa to whom Sisilia was married until his death after which Sisilia re-married; and that Sisilia failed to disclose that the respondents were living and cultivating the property even before the death of the deceased.
6. In her replying affidavit in opposition to the summons for revocation of the grant issued to her, Sisilia deposed that she was not aware of the deceased's Will as the same was not brought to the attention of the family; that H C, the 1st respondent "*is not [her] biological daughter but has been living with our family from childhood*" and that the 2nd respondent "*is my son*" and that she had a right to distribute to them shares as she thought fair; that she had "*distanced*" herself from the purported Will as "*it is not even indicated specifically whether the testor (sic) of the Will was distributing parcel No. 312 since it does not explicitly say so, yet this title No. 312 was registered on the 29th day of January 1990, before the writing of the purported Will.*"
7. Chitembwe, J. heard oral testimony in support of and in opposition to the summons for revocation of the grant. In his impugned judgment delivered on 20th March 2014, the learned Judge revoked the grant of letters of administration in favour of Sisilia.
8. The learned Judge also found that Sisilia was "*to some extent a dependant of the deceased*" and that it would be unfair to leave her out without benefiting from the suit land. In the end, the learned Judge distributed the land as follows;

(a) H C - 12 Acres

(b) Christine Cherubet Kirwa 11 Acres

(c) James Kiprotich Sirorei - 11 Acres

(d) Sisilia Mwikali Kirwa - 11 Acres

The appeal and submission by counsel

9. Dissatisfied, Sisilia, the appellant has challenged the decision of the High Court in this appeal. During the hearing of the appeal before us, learned counsel Mr. W. Athunga holding brief for E. Getanda for the appellant, referred to the memorandum of appeal and submitted that the High Court erred in revoking the grant in favour of the appellant and issuing a fresh one in favour of the respondents; that there was contradiction between the sworn and the oral evidence of the respondents in that in their affidavits in support of the summons for revocation of grant they did not disclose some of the beneficiaries of the estate namely; Stephen Kibet the first born son of the appellant and, Elizabeth Chepkoech, but that while giving testimony in court they admitted those two people were beneficiaries; that the court erred in treating a letter dated 31st December 1990 as a valid Will of the deceased without regard to section 11(c) of the Law of Succession Act in that every person witnessing a Will must see the testator append his signature whereas in this case the witnesses signed the Will on different dates; that the purported will is discriminatory in that it disinherits the appellant and Elizabeth Koech; that children of the appellant who were legitimate dependants of the deceased under section 29 of the Law of Succession Act were left out. Counsel concluded by urging that the revoked grant should be restored as it catered for all the dependants.
10. Opposing the appeal, Mr. Andrew Kiboi, learned counsel for the respondents, submitted that the

learned Judge was right in giving effect to the Will of the deceased and by revoking the grant of Letters of Administration that had been issued to the appellant on the basis that the estate of the deceased was intestate; that the Will is valid and meets all the legal requirements and is properly witnessed notwithstanding that it was witnessed on different dates.

11. Counsel argued that even if the matter had proceeded on the basis that the estate of the deceased was intestate, it was incumbent upon the appellant to seek and obtain the consent of all persons having a right to petition for letters of administration which she did not do prior to applying for the grant; that instead, the appellant secretly applied for the grant and proceeded as though the property belonged to her husband when in fact the property belonged to the deceased.
12. Regarding the complaint that the Will is discriminatory and that some of the dependants were left out, counsel submitted that the deceased gave reasons in the Will why she distributed her property in the manner that she did; that Elizabeth Koech who the appellant complains was left out, was not a dependant of the deceased. Counsel concluded by urging us to dismiss the appeal.

Determination

13. We have considered the appeal and submissions by learned counsel. There are two issues for determination. The first is whether the learned Judge erred in holding that the deceased left behind a valid Will. The second issue is whether we should interfere with the mode of distribution of the estate by the learned judge. In addressing those issues we are mindful that on a first appeal such as this, we have a duty to review and re-evaluate the evidence and draw our own conclusions, bearing in mind we have not ourselves had the benefit of hearing and seeing the witnesses testify. [See **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123**]. With that consideration in mind we will first address the question of validity of the deceased's Will.
14. Abraham Simatwa, (PW1), a farmer residing at Kapsumbermet and a nephew to the deceased, testified that he was present in 1990 when the deceased stated that she was old and wished to distribute her estate; that he accompanied the deceased to an office at a place called Lumakanda where a document dated 31st December 1990 setting out the deceased's wishes (the deceased's Will), was written and he witnessed it by signing; that he was told to keep the document until the beneficiaries became old enough. He went on to say that he kept the document until a memorial service for the deceased was held when he gave out the document where it was read and returned to him. He produced the Will as an exhibit. The cross examination of PW 1 by counsel for the appellant focused on the relations between the deceased, the appellant and her children. His testimony that the deceased executed the document, and that he witnessed it was not challenged at all.
15. H C, the first respondent and adopted daughter of the deceased testified as PW 2 and stated that she was 12 years old when the deceased died; that she was alerted that the appellant was on the property with surveyors, police and the chief and on approaching the appellant, she was harsh to her; that the chief gave her court papers including the confirmation of grant; that she was not involved in the succession proceedings resulting in the grant of Letters of Administration for the estate of the deceased issued to the appellant; that she came to know about the Will of the deceased during "a remembrance ceremony" for the deceased forty days after the burial of the deceased when PW 1 produced it.
16. James Kiprotich Sirorei (PW3) also stated in evidence that forty days after the death of the deceased a "remembrance ceremony" for the deceased was held and that Abraham Simatra removed the Will and it was read.
17. In her testimony the appellant stated that the respondents were aware that she had applied for grant of Letters of Administration in respect of the estate of the deceased but objected to the mode of distribution. As for the Will, the appellant testified that she had not heard of the alleged Will; that she was not called to witness it and that she heard about the Will in court. The appellant

went on to say that she knew PW 1 and that he referred to the deceased as his auntie; that she had sought PW1's assistance but he did not oblige. She did not at all challenge the testimony of PW 1 regarding the deceased's Will.

18. That being the entire evidence from both sides as regards the deceased's Will, there is no factual basis, in our view, for challenging the finding reached by the learned Judge that:

“The document produced by PW1 was witnessed by one JOSEPH ROTICH who signed on the 21.3./991 and PW1 who signed on the 31/3/1991. I have gone through that document and I am satisfied that the same can qualify to be a will and it does give the deceased's intention as to how she intended her estate to be distributed. Section 11 (c) of the Law of Succession Act allows a will to be witnessed in different dates. The deceased had the capacity to make the will. PW1 who is an aged man witnessed the making of the will and he kept it as advised by the deceased. Even the objector's were not aware about it until when PW1 removed it during the remembrance ceremony. I do not see any fraud on the part of any party to the processing of the will.”

19. A “Will” under section 2 of the Law of Succession Act means a legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death duly made and executed according to the provisions of Part II of the Act.

20. Section 11 of that Act provides that no written Will shall be valid unless the testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator; the signature or mark of the testator, or the signature of the person signing for him is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will; and the Will is attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, ***“but it shall not be necessary that more than one witness be present at the same time”***, and no particular form of attestation shall be necessary.

21. In our view, the deceased in her Will set out clearly her wishes regarding her estate. She included in that Will her reasons for distributing her estate in the manner that she did. It was not contested that the deceased executed the Will. Neither did the appellant contest and that two witnesses including PW 1 witnessed the Will. The only complaint touching on the Will as we understand it is that it was witnessed on two different dates. That cannot vitiate or invalidate the Will. The only witness to the Will who testified was PW 1. No questions were directed to him regarding the specific circumstances under which the deceased signed the Will.

22. Section 11(c) is categorical that ***“it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary”***. Nothing stopped the deceased from executing the Will in the presence of one witness and on a later occasion to take the executed Will to another person who then witnessed the signature upon receipt of the testator's personal acknowledgment of his signature in accordance with section 11(c) of the Act.

23. There is therefore no merit in the complaint that the learned Judge erred in upholding the validity of the deceased's Will.

24. We turn to the issue whether we should interfere with the mode of distribution of the estate as carried out by the learned Judge.

25. According to the appellant the Judge should not have interfered with the mode of distribution that had been confirmed at her behest prior to the revocation of the grant in her favour.

26. We agree with counsel for the respondents that considering that the deceased left behind a valid Will, her estate cannot therefore be administered or distributed, as an intestate estate in the manner the appellant would wish. The appellant, who as already noted described herself as “widow” in her petition for grant of letters of Administration, appears to have proceeded on the wrong premise that the land belonged to her late husband and that her children were therefore entitled to inherit it. That notion was however dispelled by the well supported finding of fact by the learned Judge that “*all the children of the petitioner [appellant] except Stephen, James and Elizabeth are not the dependants of the deceased*”. The learned Judge also made provision for the appellant resulting in the distribution of the property, regard having been had to the Will as follows;-

- a. HC - 12 Acres
- b. Christine Cherubet Kirwa - 11 Acres
- c. James Kiprotich Sirorei - 11 Acres
- d. Sisilia Mwikali Kirwa - 11 Acres

27. We are not persuaded that a basis has been laid for us to interfere with that distribution.

28. The result is that the appeal fails in its entirety and is accordingly dismissed. We order that each party shall bear its own costs of the proceedings in the High Court and of this appeal.

Dated at Kisumu this 6th day of November, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

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DEPUTY REGISTRAR