IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 169 OF 2012

BETWEEN

PATRICK MACHARIA & OTHERS …..... APPELALNTS

AND

MWANGI NDUATI …..... RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nyeri

(Sergon, J.) dated 15th July, 2011

in

H.C Misc. Application No. 197 of 1995)

****

JUDGMENT OF THE COURT

1. Kamau Kariuki (deceased) died on 27th December, 1993 without any surviving spouse or child. The appellants and the respondent are the deceased's nephews. On 1st November, 1994 the respondent was issued with letters of administration over the Estate of the deceased at the Senior Resident Magistrate's Court at Muranga. The deceased's Estate comprised of L.R No. Loc 10/ Gathinja/24 and Loc 10/ Gathinja/ T.18. The letters of administration were confirmed on 16th November, 1994. After confirmation, the above mentioned properties were transferred to the respondent.
2. Subsequently, the appellants filed an application for revocation of the grant issued to the respondent in the High Court. They sought *inter alia* revocation of the grant and an order cancelling the registration of the suit properties in the respondent's name. The grounds upon which the appellants relied on in support of the application were that, the respondent obtained the confirmed grant fraudulently by concealing material facts; the respondent concealed the existence of other beneficiaries to the Estate and the existence of an oral will which was made by the deceased on 28th November, 1993. According to the appellants, the deceased made the oral will in the presence of the parties and bequeathed L.R No. Loc 10/ Gathinja/24 to the appellants. It was also the appellants' case that since the deceased had not been survived by a spouse or child or brother or sister, the appellants and the respondent being the deceased's nephews were entitled to equal shares in the deceased's Estate.

3. In opposing the application, the respondent contended that he used to live and take care of the deceased when he was ailing. That out of gratitude, the deceased bequeathed him the suit properties. He denied the existence of an oral will.
4. The matter proceeded for hearing before the High Court through affidavit evidence and written submissions. The High Court ***(Sergon, J.)*** vide a ruling dated 15th July, 2011 dismissed the application for revocation. The learned Judge held that the suit properties were bequeathed to the respondent and consequently, the respondent was under no duty to disclose that the appellants were entitled to the Estate. Aggrieved with that decision, the appellants filed this appeal based on the following grounds:-

- ***The learned Judge erred in law and in fact by ignoring altogether the applicants (appellants) submissions and allowed himself to be misled by the petitioner (respondent) thereby arriving at the wrong decision.***

- ***The learned Judge erred in law and fact in holding that the respondent had no duty to disclose that there existed other dependants and that the deceased had indeed bequeathed him his property.***

- ***The learned Judge in arriving at the decision in the manner he did showed a clear bias in favour of the respondent.***

- ***The learned Judge clearly misdirected himself and ignored the law applicable and hence arrived at an erroneous decision.***

5. By consent, the parties herein agreed to dispose the appeal by way of written submissions. It was the appellants' submission that the application for revocation of grant had not been opposed by the respondent; the High Court relied on allegations from the bar in dismissing the application. The appellants contend that the learned Judge ignored their submissions and made conclusions based on his inventions to justify his decision which was biased. It is the appellants' case that the learned Judge misdirected himself by finding that the suit properties had been bequeathed to the respondent without any evidence. The learned Judge ignored the law particularly in regards to ***Sections 39(1), 71(3), 9(1) & (b) and 76*** of the ***Law of Succession Act***, Chapter 60, Laws of Kenya. The appellants finally submitted that the learned Judge ignored the fact that before the demise of the deceased, the respondent had filed a suit seeking transfer of the suit premises in his favour based on adverse possession. According to the appellants, this fact clearly demonstrated that the suit properties were not bequeathed to the respondent. They urged us to allow the appeal.
6. In response, the respondent submitted that he is registered as the sole proprietor of the suit properties. It was argued that the respondent was the deceased's sole care giver and the appellants never assisted the deceased when he was ailing or during his life time. Therefore, the appellants were not entitled to the Estate. It was submitted that existence of the alleged oral will was not proved by the appellants. The respondent urged us to dismiss the appeal.
7. We have considered the record, the grounds of appeal, written submissions and the law. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123,*** thus:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."***

8. ***Section 76*** of the ***Law of Succession Act***, Chapter 60, Laws of Kenya empowers the High Court to revoke a grant either on its own motion or through an application made by a party. ***Section 76*** provides: in part -

> ***" 76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—***
>
> ***a) that the proceedings to obtain the grant were defective in substance;***
>
> ***b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***
>
> ***c) that the grant was obtained by the means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; …."***

9. In this case, the appellants contended that the respondent obtained the grant by concealing material facts to the court. According to the appellants, the respondent concealed the existence of the appellants as beneficiaries to the deceased's Estate and the existence of an oral will. The learned Judge ***(Sergon, J.)*** in the ruling dated 15th July, 2011 found that the deceased had bequeathed the suit properties to the respondent. This was clearly a finding of fact and this Court will not readily interfere with a trial court's finding of fact unless it is shown there was no evidence to support such a finding. In ***Jabane – vs- Olenja, [1986] KLR 661***, this Court held,

> ***"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni -vs- Kenya Bus Services (1982-88) 1 KAR 870."***

10. Having perused the record, we note that the respondent did indicate in the application for letters of administration that he was the only beneficiary to the Estate. It is not in dispute that the deceased was survived by his nephews, the parties herein. We find that the respondent did in fact conceal the existence of the appellants as beneficiaries to the Estate. It was also the appellants' case that the deceased made an oral will on 28th November, 2003. The respondent denied the existence of the said will. We are of the considered view that the appellants failed to prove the existence of the said will. This is because the contents of the alleged will were not proved by a competent independent witness as required under ***Section 10*** of the ***Law of Succession Act***.

11. It was the respondent's case that he took care of the deceased during his lifetime and that it was out of gratitude that the deceased bequeathed him the suit properties. We find that the contention by the respondent is contrary to the evidence on record. The respondent filed a suit in the High Court in the year 1993 against the deceased claiming ownership of the suit properties through adverse possession. The respondent in his submissions argued that deceased had allowed him in the year 1976 to utilize the suit properties and as a result he had developed the same by erecting a semi permanent house and planting coffee bushes and bananas. Subsequently, in 1993 the respondent discovered that the deceased had made an application to the Land Control Board to transfer the suit properties to a third party. He admitted that due to the foregoing he filed the aforementioned suit to preserve his interest in the properties. Based on the foregoing and the fact that the deceased died on 27th December, 1993, a few months after the suit was filed, we find that the respondent did not prove that the deceased had bequeathed the suit properties to him. We find that the learned Judge did not appreciate the weight of the suit which had been filed by the respondent against the deceased and he, therefore, erred in finding that the suit properties had been bequeathed to the respondent.

12. We are of the considered view that the grant which was confirmed on 16th November, 1994 was obtained by the respondent through the concealment of material facts. We also find that the deceased died intestate and that the parties herein being the deceased's nephews are beneficiaries to the Estate of the deceased. ***Section 39 (1)*** of the ***Law of Succession Act*** provides in part:-

> ***(1) Where an intestate has left no surviving spouse or children, the net intestate shall devolve upon the kindred of the intestate in the following order of priority-***
>
> ***a) father; or if dead***
>
> ***b) mother, or if dead***
>
> ***c) brothers and sisters, and any child or children of the deceased brothers and sisters, in equal shares.... Emphasis added."***

13. The respondent too having been taken in by the deceased was given a portion of the land which he occupied from 1976, depended upon the deceased's estate and is, therefore, a dependant within the meaning of **Section 29** of the **Law of Succession** which provides:

> ***"For the purpose of this Part, "dependant" means –***

a. ***the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

b. ***such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***

c. ***where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death".***

14. For the aforesaid reasons, we find the deceased was survived by the appellants and the respondent. The deceased had taken the respondent as his own child since 1976. We, however, agree with the learned Judge that the respondent depended on the parcel of land. In addition, he took care of the deceased during his last days while the appellants were living with their father. In the premises, it is in the interest of justice that the respondent should get a share of the deceased's estate. The order that commends itself is that the deceased parcel of land known as LOC. 10 /GATHINJA/ 24 should be shared equally between the appellants taking one half portion and the respondent retaining the other one half portion comprising his developments.
15. The upshot of the foregoing is that we find that this appeal has merit and we allow the same. We revoke the grant which was confirmed on 16th November, 1994, appoint the 1st appellant and the respondent herein as joint administrators to the Estate. We order the titles over the suit land should revert to the deceased. The property be divided into two equal portions one half share to be registered in favour of the appellants as tenants in common in equal shares and the other one half share with the respondents' development to be registered in his name.
16. This being a dispute involving family members we make no orders as to costs both in this appeal and the High Court.

Dated and delivered at Nyeri this 26th day of February, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR