IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 27 OF 2014

BETWEEN

ZEALIA WANJIRU MOGUKU……..……..APPELLANT

AND

FLORENCE WANGECHI KABIRI……..……..RESPONDENT

(An appeal from Judgment/Order of the High Court of Kenya at Nyeri (Sergon, J.) dated 30th September, 2009

in

H.C. Succ. Cause No. 478 of 2003)

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JUDGMENT OF THE COURT

[1] On 19th September, 2006, Zealia Wanjiru Moguku (appellant), with two others *(we were informed at the hearing of this appeal that the other two who were co- applicants in the High Court were no longer interested in this appeal)* applied before the High Court for the annulment of grant of letters of administration in respect of the estate of the late Gathitu Githaiga. The record shows an order was issued by the High Court on 13th May 2004, granting the letters of administration over the estate of Gathitu Githaiga to Florence Wangechi Kabiru *(respondent).*

[2] It was alleged in the said summons for annulment of the grant that the respondent obtained the letters of administration over the estate of Gathitu Githaiga fraudulently by making a false statement or concealment from court of important factors to wit; that there were other beneficiaries of the estate of the deceased. That the deceased had no wife or children; the appellant was the child of the deceased brother and thus ranked in priority to the respondent. The respondents declared and mislead the court that she was the only survivor of the deceased and also failed to notify the appellant that she had applied for grant of letters of administration over the deceased's estate.

[3] As it would be expected in a matter of this nature, the respondent filed a replying affidavit denying all the allegations. The matter that is the summons for annulment of the grant was placed before Makhandia, J. *(as he then was)*, on 13th November, 2007, for directions, and the Judge gave the following directions:

"The application shall be heard by way of oral evidence for ½ day at Nyeri High Court".

The above directions were never set aside, however, when the matter came up for hearing before Sergon, J., on the 16th September, 2009, the matter proceeded by way of submissions.

[4] After considering the rival submissions and the matters deposed in the affidavits, the Judge rendered a ruling dated 30th September, 2009, which is the subject matter of this appeal. The appellant's application for the annulment of the grant was dismissed. This is what the Judge concluded in a pertinent part of the ruling:

"I have carefully considered the allegations and the counter-allegations. The letter of the Chief Gikondi Location dated 23rd October, 2003, and attached to the affidavit of Florence Wangechi Kabiru which was filed in support of the petition of the letters of administration has not been challenged. In the aforesaid letter, the area chief clearly states that Florence Wangechi Kabiru was the deceased's daughter-in-law. The chief further stated that she is entitled to inherit the deceased's estate since her husband who was the deceased's son was also dead. The applicants have not challenged the averment on the relationship between the petitioner and the deceased. They have not challenged the fact that she has been in occupation of L.R. No. Gikondi/Thimu/242 for over 35 years.

In my estimation, the petitioner and her children rank on priority as against the applicants. The petitioner was, therefore, entitled to exclude them in the list of heirs of Gathitu Githaiga alias Charles Gathitu Githaiga, deceased under Section 66 of the Law of Succession Act.

Consequently, I find no merit in the summons for annulment of grant dated 19th September, 2006. The same is ordered dismissed with costs to the petitioner".

[5] Being dissatisfied with the said ruling, the appellant has appealed relying on two grounds of appeal to wit:

1. ***That the learned Judge erred in law when he held that the appellants had to be excluded from inheriting in the estate of the deceased Gathitu Githaiga under Section 66 of the Law of Succession Act, Chapter 160 Laws of Kenya.***

2. ***The summons for Revocation ought to have been allowed and the appellants had to be provided for as per Section 26 of the Succession Act, Chapter 160, Laws of Kenya.***

[6] During the hearing of this appeal, Mr. Mahan, learned counsel for the appellant reiterated the above grounds. He submitted that in view of the conflicting evidence, it was not possible for the trial Judge to determine the beneficiaries of the deceased's estate without calling oral evidence. The allegation that the appellant is ranked in a higher priority to the respondent and she was not notified of the succession cause was never addressed by the said ruling. The appellant claims the deceased had no wife or children. The appellant is claiming to be a daughter of the deceased's brother while the respondent claims to be a daughter-in-law of the deceased, a fact that could not be resolved by way of submissions but through oral evidence. Mr. Mahan urged us to refer the matter to the High Court for retrial so that the issue of the rightful beneficiaries of the deceased can be determined through oral evidence.

[7] Florence Wangechi Kabiri appearing in person opposed the appeal but in the course of her submissions, she indicated that she had no objection to the matter being referred to the High Court for retrial through oral evidence. She asserted that she had lived with the deceased for many years. She had specifically lived on the deceased's parcel of land ***Gikondi/Thimu/242*** for 40 years. Her husband who was the deceased's son died in 2003 and the respondent was left in possession of the deceased's parcel of land.

[8] According to the respondent, the appellant lives in Subukia where she has her own parcel of land, and her interest over the deceased's parcel of land is only driven by her desire to sell it, and disposes the

respondent of ownership thereby rendering her and her children who have derived their livelihood from the suit land destitute. The respondent claimed that although the deceased did not have a biological child, she and her husband looked after him and he, therefore, left his parcel of land to them.

[9] This case was determined by way of submissions and affidavit evidence. There were no witnesses that testified even on the contentious issue of who were the beneficiaries of the deceased. Nonetheless it being a first appeal, it is the duty of the 1st appellate court to re-evaluate the evidence, assess it and make its own conclusions. See the case of ***Selle and Another v Associated Motor Boat Company Ltd and Others, [1968] EA 123 at P.126.*** Sir Clement Lestang VP said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of facts by the court below. 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 demeanor of a witness is inconsistent with the evidence in the case generally. (Abani Hameed Saif v Ali Mohamed Sholaw [1955] 22 Each 270)".

[10] The issues that fall for our determination are twofold; one whether the learned Judge erred by proceeding to determine the application for annulment of the grant through submissions; and secondly whether he erred by failing to recognize that the appellant who is claiming to be an interested party in the deceased estate was not notified of the succession proceedings. We agree with counsel for the appellant that the determination of the issue of who were the beneficiaries of the deceased could not possibly have been done without oral evidence. This is for the simple reason that there is conflicting evidence from the affidavits. The appellant claims to be a daughter of the deceased by virtue of being a daughter to the deceased's brother. There are also allegations that the deceased did not have biological children. The respondent claims to have been adopted by the deceased and was bequeathed the suit land. The deceased's estate was not determined on the basis of a written will. For all these reasons, we find it was important for the trial court to proceed with the determination of the matter through oral evidence as it had been ordered earlier on.

[11] This is in line with the *audi alteram partem* rule of natural justice which requires a court to adjudicate over a matter by according parties a full hearing before deciding a dispute on merit. See also a persuasive authority by Court of Appeal of Tanzania. ***Ismail and Another v Njati, EALR 2008 EA 2EA 155***, in which Munuo, Kileo, Iuonda, JJ.A. held:

"In line with the audi alteram partem rule of natural justice, the court is required to adjudicate over a matter by according the parties a full hearing before deciding the matter in dispute or issue on merit. The omission to give the parties a hearing on the issue of jurisdiction occasioned miscarriage of justice…".

On this issue of a fair hearing by according all the parties an opportunity to adduce oral evidence, the respondent also conceded. We, therefore, do not wish to belabor the point anymore.

[12] Finally, we also find merit in the appellant's contention that she ought to have been notified when the respondent applied for letters of administration. ***Rule 26*** of the ***Probate and Administration Rules*** makes it clear that an application for grant of letters of administration should be served on interested parties who have some degree of priority to the same grant with applicant. In this case, the ranking of the appellant *vis vis* that of the respondent can only be determined through oral evidence.

[13] Accordingly, this appeal is allowed, the orders of 30th September, 2009, dismissing the summons for annulment of grant dated 19th September, 2006, are hereby set aside. The summons for annulment to proceed for determination before another Judge of the High Court by way of oral evidence. Costs of this

appeal to abide the outcome of the said summons for annulment of grant.

Dated and delivered at Nyeri this 1st day of October, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

….....

JUDGE OF APPEAL

J. OTIENO- ODEK

….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR