IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 26 OF 2014

BETWEEN

NJENGA LIVINGSTONE.....APPELLANT

AND

JOYCE WANJIKU.....1st RESPONDENT

PAULINE WANGUI.....2nd RESPONDENT

GRACE WANJIRU KAMAU.....3rd RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Sergon, J.)

dated 2nd August, 2014

in

Nyeri H.C Misc. Applic. No. 328 of 1995)

****

JUDGMENT OF THE COURT

1. The appellant, Njenga Livingstone, lodged a petition to be issued with letters of administration in the Estate of Livingstone Machura (deceased) before the Senior Resident Magistrate's Court at Kerugoya in Succession Cause No. 42 of 1992. The appellant is a son to the deceased who died on 28th July, 1991.

2. In his evidence before the trial magistrate, the appellant testified that the deceased was married thrice and he gave the names of the widows as Gladys Njeri (deceased and mother to the appellant), Joyce Wanjiku and Pauline Wangui. The 1st and 2nd respondents in this appeal are the surviving widows of the deceased to whom letters of administration to the estate of the deceased were granted.

On 27th November, 1995, the appellant took out Summons for Revocation of the letters of administration issued to the 1st and 2nd respondents. The ground in support of the application is that the proceedings to obtain the grant were defective in substance; that there were untrue allegations therein. The Summons for Revocation was heard before Hon. Justice Sergon who in a ruling dated 2nd August, 2012 dismissed the

same. In dismissing the Summons, the learned Judge expressed as follows:

"If the applicant felt that the respondents had concealed any material matter, he had the opportunity to tender evidence at the Kerugoya Court. The record shows that the applicant was not happy with the decision to confirm the grant on 7th October, 1993….It is clear from the ground put forward in support of the application for revocation of the grant that the applicant is basically dissatisfied with the judgment of the Kerugoya Court and not the role played by the respondents before that Court. It is a fact that the applicant and the respondents were found to be a son and wives respectively of the deceased. If the applicant is unhappy about that factual finding, then his only recourse is to appeal and not to seek for the revocation of the grant. I find the respondents not guilty of any material non-disclosure."

4. Aggrieved by the dismissal of the Summons for Revocation of Grant, the appellant has filed the instant appeal. Twelve grounds are listed in the memorandum of appeal which can be compressed and summarized as follows:

i. That the learned Judge erred in law and fact in failing to consider that at Kirinyaga, two administrators i.e. the Assistant Chief of Mugamba Chiura sub-location, Mr. Samson Mbui Muembu and Murinduko location Chief, Mr. Erastus Kaboro corruptly and unjustifiably gave the 1st and 2nd respondents a letter illegally confirming that they were the only heirs of the appellant's father, Livingstone Machura Gicheru (deceased), which led to a very serious crisis in this matter and the Judge having noted this should have revoked the grant issued and confirmed by Kerugoya Court in SRM Succession Cause No. 42 of 1992.

ii. The learned Judge erred in law and fact in failing to consider that due to the mistakes made by the two administrators, the appellant filed a case against them because they confessed to have made a mistake and gave the wrong people who had their respective husbands a letter in respect of the estate of the deceased.

iii. That the learned Judge erred in law and fact in failing to consider that the 1st and 2nd respondents herein are married women who have their respective husbands from whom they have ran away to come and grab the land of the deceased. That the 1st respondent's husband is called Mwangi Githae, while the 2nd respondent's husband is Kaguchia Benjamin. That the two respondents' were brought to the estate of the deceased by the Chief and the Assistant Chief.

iv. That the learned Judge erred in law and fact in failing to consider that before the trial court, the two respondents did not tell the court when they got married to the deceased and the Judge failed to consider that the trial magistrate was biased.

v. That the learned Judge erred in law and in fact in failing to consider that although the deceased had sub-divided his Muranga land, he did not sign any document that showed he wanted to give that land to two nephews: Stephen Kamau and Kamau Kariuki and thus the court at Kerugoya had no justifiable evidence to warrant giving the two nephews the deceased's land.

vi. The learned judge erred in law and in fact in stating that the appellant's application did not meet the requirements of Section 76 of the Succession Act.

vii. The learned judge erred in law and fact in failing to note that the respondents being wives of their respective husbands, the appellant had no business to inform them that he was filing the Kerugoya SRM Succession Cause.

viii. The learned judge erred in law and in fact in considering that the respondent's evidence was true and worth of any credit thereby causing the High Court to arrive at the wrong conclusion.

5. At the hearing of this appeal, the appellant acted in person while the respondents were represented by learned counsel, Mr. Kebuka Wachira. The parties filed written submissions in the appeal. We have considered the grounds of appeal, the written submissions and the ruling by the learned Judge.

6. In his written submissions, the appellant reiterated the grounds of appeal and stated that the most serious dispute is that estate of the deceased was given to strangers and the children of the deceased's brother which is against the law of succession. He submitted that in the year 1956, the deceased was allocated 14.9 acres of land being land parcel no. Gichugu/Settlement/Scheme/63; the deceased decided to develop the land and engaged casual labourers who included the two respondents in this case; that when the deceased died on 28th July, 1991, he never told his children (who include the appellant) that the 1st and 2nd respondents were his wives as is the practice in Kikuyu customs for fathers to tell his children and show them their step mothers; that when the deceased died, the 1st and 2nd respondents secretly went to the Assistant Chief of Mugamba Chiura sub-location one Mr. Samson Mbui Muembu and to the Chief of Murinduko one Mr. Erastus Kaboro who without any justifiable evidence gave the respondents a letter illegally showing that they were wives of the deceased; that the respondents gave this letter and false information to the Kerugoya trial magistrate's court which led to the grant of letters of administration to the two respondents in this matter; that the two respondents are strangers who should never have been granted the letters of administration to the estate of the deceased. The 1st and 2nd respondents have their respective husbands and they have never stated when they got married to the deceased. The appellant submitted that he is a lay person and the learned Judge erred in saying that his application for revocation of grant did not meet the requirements of ***Section 76*** of the ***Law of Succession Act***; the learned Judge should have elaborated why he said so.

7. The respondents in their written submissions urged this Court to dismiss the appeal; that it was the appellant who initiated the process for grant of letters of administration before the Kerugoya Magistrate's Court ; the proceedings before the trial magistrate were neither defective nor was any untrue allegations of fact made; the appellant acknowledged before the trial court that the 1st and 2nd respondents were the two surviving widows of the deceased. The trial court in its ruling as to who was to be appointed the administrator appointed the two surviving wives; when the issue of distribution of the estate came up for hearing, it was the appellant's advocate who proposed how the estate was to be distributed; that the issue of distribution was heard by way of *viva voce* evidence. The appellant in the year 1994 made an application before the High Court at Nyeri in HC Misc. App. No. 99 of 1994 seeking extension of time to file an appeal against the confirmation of grant; he abandoned the application and filed another application being Nyeri H.C. Misc. App. No. 189 of 1994 seeking orders to revoke the grant; he withdrew this application and filed another application for revocation as Nyeri H. C Misc. Application No. 328 of 1995 which is the subject of the present appeal; that the application for revocation of grant was dismissed and this provoked the instant appeal. Counsel for the respondents submitted that the 1st and 2nd respondents being widows of the deceased were not strangers; that during the distribution of the estate of the deceased, the appellant engaged the services of counsel who in his submission reckoned that the deceased had three wives; the issue of whether the 1st and 2nd respondents were wives to the deceased did not arise as the appellant and his advocate had reckoned so. Counsel submitted that when the estate of the deceased was being distributed, nobody objected and if the appellant had further information he ought to have disclosed the same to the trial court.

8. On our part, we remind ourselves that this is a second appeal which is confined to matters of law. ***Section 72*** of the ***Civil Procedure Act*** stipulates that:-

> ***"Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely: -***
>
> ***(a) the decision being contrary to law or to some usage having the force of law;***
>
> ***(b)the decision having failed to determine some material issue of law or usage having the force of law;***

(c) Substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

9. The thrust of the appellant's case is that the learned Judge erred in law in upholding the decision of the trial court that granted letters of administration to strangers. It is the appellant's contention that the 1st and 2nd respondents were not wives of the deceased; that the respondents have their respective husbands. Counsel for the respondents submitted that the appellant and his then advocate reckoned that the 1st and 2nd respondents were the surviving widows of the deceased. The learned Judge in his ruling held that the factual issue as to whether the 1st and 2nd respondents were wives to the deceased had been established.

10. We are of the considered view that evidence is required to prove whether or not the two respondents were wives to the deceased. We have examined page 126 of the Record of Appeal and in particular, the proceedings before the trial magistrate on 30th June, 1992 wherein the appellant testified as follows:

"My application is that I be issued with letters of administration intestate to the estate of Livingstone Machura, deceased. He died last year on July 28th. I am related to him by reason of being his son. He was married thrice. The names of the widows are Gladys Njeri, Joyce Wanjiru and Pauline Wangui. Only Gladys Njeri my mother is not alive. She died before the deceased…."

11. On the same day 30th June 1992, Joyce Wanjiku the 1st respondent herein testified that she had filed objection jointly with her co-wife being widows of the deceased and they had a better right to administer the estate of the deceased as opposed to the appellant who was only a son to the deceased. The trial court in its ruling stated as follows:

"The law of succession is very clear. Where the deceased is survived by a spouse, that spouse has a higher priority as far as administering the estate is concerned; the petitioner is a son of the deceased, the objectors are his surviving widows. Legally, their right to letters of administration ranks higher than that of the petitioner. I accordingly order that the letters be issued to the 2 surviving spouses of the deceased."

12. The learned Judge observed that it is a fact that the applicant and the 1st and 2nd respondents were found to be a son and wives respectively of the deceased. This Court has stated before that it will not interfere with concurrent findings of fact by the two courts below unless the decision is demonstrated to have been based on no evidence or that the decision was made in error of law.

13. In the present case, there is a concurrent finding by the two courts below that the 1st and 2nd respondents were the surviving widows of the deceased. We note the testimony of the appellant before the trial magistrate on 30th June, 1992 and we see no reason to interfere with the concurrent finding of fact by the two courts below. We are of the considered view that the learned Judge did not err in fact or law in upholding the trial court's finding that the 1st and 2nd respondents were the surviving widows of the deceased. We have also examined the provisions of ***Section 66*** of the ***Succession Act*** and we concur that the respondents as surviving widows to the deceased have a priority in grant of letters of administration over the appellant who is son to the deceased. We find that the learned Judge did not err in failing to revoke the letters of administration issued in the name of the respondents. We also find that the other grounds raised by the appellant have no merit.

14. In totality, we find no merit in this appeal which we hereby dismiss with costs to the respondents.

Dated and delivered this 25th day of November, 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 of the original.

DEPUTY REGISTRAR