



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 260 OF 2008

BETWEEN

FRANCIS JAMES NDEGWA.....APPELLANT

AND

JULIET WANGUI NDEGWA.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 21st April, 2008

in

H.C. SUCC. C. NO. 72 OF 2004)

JUDGMENT OF THE COURT

1. The gravamen of this appeal is the estate of the late Robert Wahome Ndegwa (deceased), who died intestate on 15th December, 2002 at the age of 33 years. The deceased was survived by his parents Francis James Ndegwa, father (appellant), Juliet Wangui Ndegwa, mother (respondent) and two sisters at the time aged 30 and 26 years respectively. On 12th February, 2004, the mother of the deceased petitioned for letters of administration in respect of their son (deceased). She named the appellant and the deceased's two siblings, Irene Wangari Ndegwa at the time aged 30 years and Jane Murugi Ndegwa at the time aged 26 years as persons surviving the deceased.

2. The following assets were indicated as the properties of the deceased:

- a. ***Plot Nairobi Block 75/669 Buru Buru Estate.***
- b. ***Bank Account at Barclays Bank Nkurumah Road, Mombasa.***
- c. ***Motor Vehicle KAQ 716D Toyota Hiace.***
- d. ***Motor Vehicle KAN 827M Toyota Hiace.***
- e. ***Motor Vehicle KAQ 539D Toyota Corolla AE 110.***

The estimated value of the estate was put at Kshs.10,000,000/=.

3. The two sisters of the deceased gave their consent for their mother to be issued with letters of

administration over the deceased's estate. Nonetheless, the deceased's father (appellant) did not give his consent, he was served with a citation to either accept or refuse to apply for letters of administration. The appellant filed an objection and at the same time, he cross-petitioned for letters of administration. On 7th February, 2005, both the appellant and respondent were appointed after reaching a compromise, as the joint administrators of the deceased's estate. As the record shows, there was no unity or cooperation in the administration of the deceased's estate as each of the administrator pursued their own interests in the use of the deceased's estate without regard to each other or the law governing the administration of an estate of a deceased person. The appellant took control of the deceased's fleet of motor vehicles and the collection of rent from a house in Buru Buru Estate Nairobi, while the respondent withdrew some money from a bank account at National Bank of Kenya.

4. At the same time, there was so much tension and acrimony between the appellant and respondent due to matrimonial disharmony as the respondent alleged that she was thrown out of the matrimonial home by the appellant and rendered destitute without regard to the contribution she had made to the family fortune or her own poor health. Be that as it may, it would appear that the respondent applied for the confirmation of the grant; the appellant did not appear at the hearing and the grant was confirmed. The appellant was dissatisfied as he claimed he was not notified and he therefore sought for the revocation of the grant. That is what provoked the appellant in filing the summons for revocation dated 20th December, 2007.

5. The hearing of that application proceeded with both the appellant and respondent giving oral evidence in addition to the affidavit evidence. The appellant contended that he was not served with the summons for confirmation of the grant despite the fact that he was a co-administrator. He also objected to the distribution of the estate that was proposed by the respondent. He wanted the Buru Buru house to be shared equally between him and the respondent. The appellant claimed that all the motor vehicles were his; he also challenged the inclusion of his daughter, **Juliet Nyawira** as a beneficiary as she left the country in 1997 and settled in the United States of America. He also claimed that the respondent took off from the matrimonial home at **Thegenge/Karia 288**, from 2003 on her own volition. During cross-examination, the appellant admitted that he was collecting rent from the Buru Buru House but denied having withdrawn a sum of Kenya Shillings 6 Million from the deceased's *matatu* business.

6. The respondent also testified that she married the appellant in 1969 and they were blessed with the deceased and two other daughters. However, the appellant lost his employment in 1971, and since that time he was not gainfully employed; he had no income as he had even closed his bank account in 1980 and used to rely on the respondent for support. Before their son died, he was working in Mombasa where he operated a fleet of vehicles for *matatu* business. After his death, the appellant took control of those vehicles; some of them were in the name of the deceased, while others were in the names of the dealers who had sold them. The respondent contended that the appellant started mistreating her and their daughter called Irene Wangare who unfortunately passed away in 2005. The respondent was forced to flee from the matrimonial home and was renting a house at a great expense and also struggling to meet her medical bills. She told the trial judge that the deceased used to pay for their daughter's education and upkeep in the United States of America.

7. The respondent was involved in a road traffic accident in 1995 and was somehow incapacitated as a result of the injuries sustained. It was her deceased son who used to cater for her medical needs when he was alive. This is what the learned Judge observed in part of the Judgment:

“I did observe that the respondent was very poor in physical health. She could not communicate very coherently and her hands were clawed. I therefore, accept the respondent's contention that the deceased did support her in the medical expenses she required during his lifetime”

The learned trial Judge also dealt with the issues of whether the grant should be revoked and in a well reasoned judgment, found no justification for the revocation.

8. The issue of ownership of motor vehicles was highly contested by the appellant who claimed the

vehicles belonged to him. However, the learned judge disbelieved him and concluded the vehicles belonged to the deceased's estate, but had remained in the appellant's possession. This is what the learned judge observed in part of the judgment;-

“He therefore has benefited from the proceeds of these vehicles which are matatus.... I also make a finding that the deceased did support his young sister, Jane Murugi Ndegwa, in her pursuit in education. She is therefore, entitled as per Section 29(1) of the Succession Act, to inherit from this estate. The court does hereby confirm the grant in the following terms: -

- 1. To Juliet Wangui Ndegwa Plot NRB Block 75/669 Buru Buru Estate, Barclays Bank Account Nkurumah Branch Mombasa, money in National Bank, Motor Vehicle KAL 895B and Motor Vehicle KAT 549T.***
- 2. To Francis James Ndegwa KAQ 539D, KAN 827M, KAQ 716D and money in NSSF.***
- 3. To Jane Murugi Ndegwa money in Standard Chartered Nyeri Branch.”***

9. These are the orders that provoked this appeal; the appellant has raised a total of eight grounds of appeal as follows:-

- 1. The learned Judge in the Superior Court erred in fact and law in dismissing my application for revocation/annulment of grant.***
- 2. The learned Judge in the Superior Court erred in fact and in law in failing to appreciate that the Appellant was entitled to inherit half (½) of the Deceased's estate and therefore erred in distributing the estate in the manner she did.***
- 3. The learned Judge in the Superior Court erred in distributing part of the Deceased's estate to a sister of the Deceased who was not a dependant or beneficiary of the Deceased.***
- 4. The learned Judge in the Superior Court erred in including for distribution properties which were not part of the Deceased's estate.***
- 5. The learned Judge in the Superior Court erred in failing to find both in law and in fact the only two beneficiaries in the Deceased's estate who were solely entitled to inherit the Deceased were the Appellant and the Respondent herein.***
- 6. The learned Judge in the Superior Court erred in fact and in law in failing to fully adequately re-evaluate the case before her so as to arrive at the correct finding(s).***
- 7. The learned Judge in the superior Court erred in law in alienating the Appellant's rights in the Deceased's estate which caused the Appellant to suffer serious injustice in all circumstances.***
- 8. The learned Judge in the Superior Court erred in fact and in law in failing to take into account the Appellant's grounds and reasons for his Application for the Revocation of the Grant which were very sound and well founded.***

10. At the hearing of the appeal, Mr. Macharia, learned counsel for the appellant elaborated on the above grounds in his oral submissions. He contended that there was evidence to prove the motor vehicles did not belong to the deceased. The log books were in the names of other parties from whom the appellant purchased, except KAL 905L, which was in the name of the deceased. In other words, the appellant was given his own properties. Secondly, the estate was distributed to the appellant's daughter who was no longer a dependant of the deceased. Thirdly, the prime property namely: the house in Buru Buru was given to the respondent when both the appellant and respondent would have benefited equally

as parents of the deceased.

11. This appeal was opposed by Mr. Muthoni, learned counsel for the respondent. Firstly, he pointed out that the appeal was incompetent as it was filed without leave of court as provided for under **Section 50** of the **Law of Succession Act**. Secondly, the letters of administration were jointly issued to the appellant and respondent after the respondent petitioned and cited the appellant. The appellant did not raise any issue regarding the motor vehicles up until distribution; the matter was heard by way of *viva voce* evidence and the respondent was able to demonstrate that the appellant had no money of his own, until he plundered the deceased estate. He depended on the respondent until the deceased passed away, after which he took over the running of the deceased's *matatu* business. As regards the distribution of some of the money to the daughter, counsel urged that siblings do help one another and that is within the provisions of **Section 29** of the **Law of Succession Act**. Counsel urged us to dismiss the appeal and uphold the judgment of the High Court.

12. The main, if not the only issue raised in this appeal is whether the estate of the deceased was properly distributed. All the other issues such as whether the court erred by allocating motor vehicles which did not belong to the deceased to the appellant; whether the estate should have been distributed equally among the appellant and the respondent; and whether the court erred by awarding the deceased sister the money in his bank account, all touch on distribution.

13. We have considered the above issues with tremendous anxiety as sadly, this is a dispute between a husband, and his wife over their son's estate. And the issue is whether the wife who is ailing should have been allocated the deceased's house at Buru Buru Estate in Nairobi and also whether their daughter should have been allocated some money in a bank account. Before filing this appeal, the appellant did not seek leave of the court as provided for under **Section 50** of the **Law of Succession Act**, which provides that:-

“An appeal shall lie to the High Court in respect of any order or decree made by the Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final.”

14. This issue was raised at the hearing of the appeal, a practice we deprecate as a court, as counsel for the respondent waited to raise the objection at the hearing, instead of making an appropriate application to strike out the appeal under **rule 84** of the **Court of Appeal Rules**. In the interest of proportionality envisaged by the provisions of **Section 3A, 3B** and **Article 159** of the **Appellate Jurisdiction Act** and the **Constitution of Kenya**, respectively, we choose to address the merit of the appeal but not without caution to counsel that the provisions of the law should never be disregarded and sacrificed at the altar of the inherent and discretionally powers.

See the case of **City Chemist (NBI) and Another V Oriental Commercial Bank Limited**, Civil Appl. NO. NAI 302 /008:

“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principle. The application of clear and ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application”

15. In this succession matter, it is the respondent who petitioned for letters of administration and cited the appellant. That is when the appellant filed an objection. The parties however, agreed that letters of administration be issued jointly to the appellant and the respondent. It is manifestly clear from the judgment by the learned Judge of the High Court that both administrators were at logger heads, and that explains why the respondent applied for confirmation of the grant without the appellant. The issue of

whether the grant should be revoked is what was determined by the Judge and she rightly pointed that it was not necessary to revoke the grant as the court has power to set aside the orders of distribution. We agree with this reasoning because, the grant was held by both appellant and respondent, the appellant was only challenging the distribution.

16. On distribution, the learned Judge had the opportunity to observe the parties during the hearing and what is most striking even to us, is that when the respondent petitioned for grant of letters of administration, she cited the motor vehicles as assets of the deceased. The appellant did not raise any objection regarding ownership of those vehicles, in other words he did not say they did not belong to the deceased. Evidence was tendered by the respondent which was not controverted that the appellant had no money of his own from the time he closed his Bank Account in 1980, until the deceased died and he took over the running of the fleet of matatus that belonged to the deceased.

17. The learned Judge accepted the evidence that the respondent was in possession of the motor vehicles even though their log books were in the names of the dealers. The judge accepted that the deceased had not effected the transfers. The other matter that was considered was the physical frailty of the respondent who suffered from a motor vehicle accident in 1995 and thereby sustained permanent injuries. The Judge also considered the appellant had intermeddled with the estate of the deceased and refused to give an account of the income from the vehicles or rent collected. Even during the hearing of this appeal, we tried to enquire and both counsel had no idea about the amount of money that was left in the bank accounts of the deceased.

18. As far as the distribution of the house in Buru Buru Estate to the respondent is concerned, we agree with the learned Judge that there was justification in allocating it to the respondent so as to derive income to pay for her medication due to her poor health. The respondent testified that she generally relied on the deceased for medication before he died. On the issue of the allocation of the proceeds of money at Standard Bank to Jane Murugi Ndegwa, we agree with counsel for the appellant that no evidence was tendered to show that she continued to be a dependant of the deceased after he paid her fees. Although we agree the deceased used to support his sister in her education by sending her school fees and up keep regularly in the United States, after she finished education, there was no evidence to show she would have continued to depend on the deceased.

19. We agree this amount of money should have been distributed equally between the appellant and respondent. To that extent, all the other grounds of appeal fail except ground number 5. We uphold all the orders of the High Court but interfere with the order granting the Bank Account to Jane Ndegwa and substitute it with an order that the money at Standard Bank be divided between the appellant and respondent equally.

This being a family matter, each party to bear their own costs.

Dated and delivered at Nyeri this 23rd day of May, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR