IN THE COURT OF APPEAL

AT NAKURU

(Coram: Tunoi, Bosire & Owuor JJ A)

CIVIL APPEAL NO 172 OF 2002 (NAK 13/2000)

M W G ……………………..…….APPELLANT

VERSUS

R M K …..………..……….…... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru

(Mr Justice Rimita) dated 4th February, 2000 in HCSC No 216 of 1996)

JUDGMENT

G N N, now deceased and whose estate was the subject matter of objection proceedings before the Superior Court and from which this appeal emanates, died intestate on 13th June, 1996. R M K, the respondent, thereafter on or about 2nd July, 1996 filed Succession Cause No 216 of 1996 seeking a grant of Letters of Administration to be made to her on the ground that she was the wife of the deceased and therefore a beneficiary together with her three children.

On 12th August, 1996 the objector (appellant herein) filed an objection to the making of a grant in favour of respondent alone, on the ground that she was the other wife of the deceased contending that the respondent had excluded her together with her three children from the petition that she had presented to the Court and thereby disinherited the 'second house' of the deceased. She thereafter filed an application under section 29, of the Law of Succession Act, cap 160 of the Laws of Kenya, which application appears to have been abandoned. Pursuant to an order made by the Court, the objection was heard by way of *viva voce* evidence. The appellant testified and called her mother-in law, T W **(**W**)** as a witness, while the respondent in addition to herself called four other witnesses. Rimita J, who heard the matter, was not satisfied that the appellant had proved her case. He categorically found that she was not the deceased's wife, nor were her children the children of the deceased. Consequently, he held that they were not beneficiaries of the estate and he accordingly dismissed the appellant's objection. This is the decision that the appellant is dissatisfied with. Her appeal before us was canvassed mainly on two grounds, namely that:

"1. The learned judge erred in finding that appellant was not a wife of the deceased.

2. The judge equally erred by finding that the children of the appellant were not children of the deceased."

The appellant's case was, briefly, that she and the deceased got married under Kikuyu customary law in

1979. She was the deceased's first wife and he paid dowry for her amounting to 13,000/= which was converted into a number of goats which she did not know. She knew the respondent as her co-wife, the respondent having been married to the deceased in 1981. The respondent lived in Ndundori on their family land together with their mother-in-law while she, the appellant, lived in Nakuru town

Section 39, in the house she previously resided with the deceased. She had three children with the deceased namely B, aged 17 years, T, aged 15 years and P W, aged 5 years. B was named after the deceased's father, T after his mother and P after her own mother. The appellant produced in evidence the children's birth certificates that had been obtained in July 1996 long after the deceased's death. She also produced child health cards from Nakuru Provincial General Hospital, all prepared and obtained on one day bearing the deceased's name as the father of the children.

In support of her case, W testified that both the appellant and the respondent were her son's wives. The appellant was the first one to be married and she and her late husband paid dowry for the appellant amounting to Ksh 13,000/=. On the other hand, although she recognized the respondent as the deceased's second wife, she did not pay any dowry for her because the deceased kept on telling her to wait. However, she acknowledged her as being her daughter-in-law and all her children as her grandchildren. She was categorical that:

"The petitioner would be wrong to say that she was the only wife my son had. Both the petitioner and the objector are co-wives. My son had property. Both the wives should inherit the deceased's property".

The respondent's case was simply that she was the only wife of the deceased and her children were the only children of the deceased. Contrary to what the appellant and her mother-in-law said, she never knew the appellant during the deceased's life time. She had, during the whole period she had been married, lived at Ngorika at the deceased's home. The deceased was a veterinary doctor who moved to and worked in several places in the country but who at the time of his death was stationed at Nakuru. He died at Nakuru Nursing Home where he had been hospitalized for two weeks. She looked after him during the time of his illness and upon death, she made the funeral arrangements with members of his family and friends. Funeral committees were formed and the burial took place at their home. The appellant, if at all, attended the burial like any other visitors from Nakuru. She did not take part in the burial, nor was she acknowledged or introduced or included in the family pictures taken as is the Kikuyu custom. The programme and eulogy read at the funeral made no mention of any other wife or family of the deceased. The respondent only came to know about the appellant two weeks after the burial when she brought her case to court.

The respondent's story was supported by several witnesses. Josphat Mburu **(**Mburu**)**, the Chief of Ngorika Location where the deceased had a home knew the deceased's family well. He was a friend of the deceased and knew the respondent as the deceased's only wife. He had never seen the objector. Mburu was one of the people that was involved in the arrangement of the funeral while the committee was headed by one Daniel Njenga **(**Njenga**)**. Njenga, likewise was born and lived in Ngorika. He was the chairman of the funeral committee as well as the master of ceremony. During the burial, they had involved the respondent as the deceased's only wife in all the arrangements of the funeral. He is the one who gave the eulogy which was produced as an exhibit and it clearly indicated that the deceased had only one wife, the respondent.

Regarding her marriage to the deceased the respondent's evidence was that dowry was paid to her parents. She called her brother, HN K **(**K**)** as a witness. He was present when the deceased, his father, K N, and M N came to their home and paid Ksh 3,000/= dowry to his parents in 1983.

Although his father was still alive, he was too old and lived in Nyahururu with his second wife and hence his not being able to testify in the Superior Court.

Mr Githui for the appellant contended before us that the learned judge should not have relied on the evidence of the respondent and her witnesses, and more important the funeral programme which excluded the appellant to reach the decision that he did that the appellant was not a wife of the deceased.

Instead, he argued that the learned judge should have relied on the evidence of the appellant herself and her only witness, the mother-in-law, and, found that she was a wife of the deceased.

First and foremost, it is the duty of the trial judge or magistrate to analyze, consider and evaluate the evidence put before him and to take note or be sensitive to the demeanour of the witness or witnesses in order to make a finding on the credibility of the witness or witnesses as the case may be.

The duty is heavier in the case where the Court has conflicting evidence before it. The predecessor of this Court in the case of *Dinkerrai Ramkrishan Pandya v R* [1957] EA 337 quoted with approval from the old case of *Glannibanta* (2) (1876), 1 PD 283 where the Court of Appeal stated:-

“Now we feel, as strong as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and 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.”

The learned judge of the Superior Court apart from evaluating the evidence as we also have done made a categoric finding that he had watched the demeanour of the objector and was satisfied that she was not telling him the truth. He thus stated:

“I have considered all the relevant materials placed before me. I looked at the demeanour of the witness because in a case of this type one has to be careful.

This is because generally co-wives would be expected to be rivals... I do not believe the objector.”

Apart from the view expressed in the penultimate sentence which is not supported by evidence, we are not persuaded that we should interfere with that decision and we cannot interfere with it unless it can be shown to us that the learned judge acted on any wrong principle. In addition to the above, he considered three other factors. Firstly, that the objector claimed to have been married to the deceased for a period of almost 21 years and yet there was nobody else who she called to support her story except her alleged mother-in-law.

Her own father and mother, the people who had allegedly received the dowry were alive and yet neither of them testified, nor was anybody else that took the dowry to her family called as a witness.

Then there was the issue as to where the deceased lived in Nakuru. There was no evidence to support the objector’s allegation that she cohabited with the deceased as husband and wife in the house at Section 39 in Nakuru.

The evidence that emerged was that indeed and in fact the deceased had a house at Kiti in which he lived and in which the respondent visited him every now and then. That house according to the evidence, was broken into and some of the deceased’s documents stolen.

Finally, there was the evidence from the organizers of the funeral as to what transpired at the funeral. Contrary to what the appellant said, none of the witnesses who arranged for the funeral, programme and eulogy knew of the existence of the objector or her children. She was not at the funeral as a wife. She took no part in the heavy responsibility that accompany a funeral. Her children were not present at their alleged father’s funeral, and more importantly she was not included in the “pictures” taken of the relatives of the deceased.

The only wife known to everybody , the Chief Chairman of the committee, people who grew up with the deceased and were his neighbours was the respondent. We cannot fault the learned judge in coming to the

conclusion that he came, that the appellant had not established her case and she was not a wife of the deceased.

As to the second complaint that the learned judge erred in not finding that the appellant's three children were indeed children of the deceased, the only evidence before the learned judge to establish this important fact were the children's birth certificates and hospital cards, both set of documents which were obtained after the deceased's death

Counsel for the appellant conceded, and in our view, rightly so, that these documents were of no evidential value. They were obtained as the learned judge found:

"She relied on her children's clinical cards which all appear to be new. They were made by the same hand.

This shows that they were prepared for the purpose of this case. The birth certificates were also prepared during the pendency of this case. They were meant in my view to mislead the Court."

We are in full agreement with the view of the learned judge. There was no doubt that the respondent had merely walked into the hospital and had all the cards written out for each of the children without any regard as to whether the children had attended any clinic at the hospital in the long period of their infancy or not.

We have, as it is our duty as the first appellate court, examined and considered the evidence that was put before the learned judge of the superior court. We are satisfied as the learned trial judge was that the appellant was not the deceased's wife nor were her children the children of the deceased, so as to qualify as dependants and beneficiaries of the deceased's estate. We find no merit in this appeal and the same is dismissed with costs to the respondent.

Dated and delivered at Nakuru this 21st day of March, 2003

P.K.TUNOI

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR