



REPUBLIC OF KENYA



KENYA LAW
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**Gitari & another v Gitari & 2 others (Civil Appeal 1 of 2019)
[2024] KEHC 9366 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 1 OF 2019
AM MUTETI, J
JULY 31, 2024**

BETWEEN

GICHOHI NJIMO GITARI 1ST APPELLANT

SAMUEL MWAI GITARI 2ND APPELLANT

AND

ISAAC GICHOHI GITARI 1ST RESPONDENT

SAMUEL MBUTHIA GITARI 2ND RESPONDENT

EDITH WAMUYU GICHOHI 3RD RESPONDENT

*(An appeal against the Judgment delivered on the 19th December 2018 in Nyeri
Chief Magistrates Succession Cause No. 54 of 1985 by Hon. W Kagendo C.M)*

JUDGMENT

Introduction

1. The Appeal arises out of a long drawn Succession dispute pitting the parties since 1985. The learned Hon. chief Magistrate W. Kagendo (as she then was) delivered her judgment on 19th December 2018 bringing to a close a 33 year old dispute.
2. However, the two appellants' were dissatisfied with the mode of distribution and preferred the present Appeal.
3. The uncontested facts of this matter are that the deceased Gitari Gichohi was a polygamous African man blessed with 4 wives.
4. The wives co-existed harmoniously during their happy marriage with the deceased.
5. One of the four wives Zilporah Nyakahui had no children of her own.



6. The deceased had during his life time subdivided his land into four portions to accommodate each of his beloved wives.
7. Isaac Gichuhi Gitari and his mother took care of Zipporah Nyakahiu.
8. The late Ziporra Nyakehius had given some portion of her land to Jane Gichohi Gitari. Although Jane Gichohi did not participate at the hearing the other protestors confirmed that he had developed the portion in question where is widow Edith Wamuyu lived.

Grounds Of Appeal

9. The appellants challenge the court's decision on the following grounds:
 - i. That the learned Honourable Magistrate erred in law by disregarding the earlier judgment of 8th June 1992 which judgment had not been set aside. The Appellants' contend that there are two judgments in this matter.
 - ii. the Learned Honourable Magistrate erred in holding that the deceased's wish was clear and if it was, it is difficult whether such a wish can be transferred.
 - iii. The learned Honourable Magistrate erred in law by distributing an estate that did not exist of Zipporah Nyakahiu Gitari while the estate belonged to the deceased.
 - iv. The learned Honourable Magistrate erred in relying on two conflicting versions of Evidence adduced by one Samuel Mbuthia Gitari.
 - v. The learned Honourable Magistrate erred in law by distributing the estate in such a manner that the appellants house share was unfairly disadvantaged and giving the lion share to the Respondents.
 - vi. The learned Honourable Magistrate erred in law and fact by disregarding the evidence of gift of land to the 3rd Respondent's husband (deceased) by the deceased while distributing the estate.
10. I have looked at the grounds closely and perused the record in order to summarize the issues for determination by this court.

It does appear to me that the appeal raises the following issues:-

- a. Whether there exists two judgments in this matter and if so which of the two should take effect.
- b. Whether the learned Honourable Magistrate correctly applied the law in distributing the estate of the deceased;
- c. Whether the distribution of the estate was equitable in the circumstances.

Analysis And Determination

11. In regard to the first issue, the record reflects that on 28th September 2018, MR. KIUNDA indicated to the court:

“there is a judgment on record ... on 18th January 1992”.

Mr. Muchiri appearing for one of the protestors stated:

“I am surprised to hear about a judgment.”



12. The court record further reads:-

“The court needs to confirm what is on record. Matter taken out of the hearing list. Mention on 19th October 2018”.
13. However, when the court resumed on 19th October 2018 there is no indication that the issue as to whether or not there was a judgment was not revisited.
14. The court record shows that Mr. Mshila who was holding brief for Mr. Muchiri was Gathoni Gitahi indicated to the court on 19th October 2018 that;-

“Let’s take a hearing date”.
15. The court then proceeded to give a hearing date for the 26th October 2018.
16. It is important to point out that none of the parties raised the issue of there being judgment on record and the matter appears to have died there.
17. The Appellants in this Appeal vide their Memorandum of Appeal dated 3rd January 2018 drawn, signed and filed by M.K Kimindu Advocate maintain that there is a valid judgment of 8th June 1992 since the same was never set aside.
18. The Appellant’s counsel Mr. Kiminda was on record for the Applicant/Petitioner on the succession Cause.

Although counsel had raised the issue of there being a judgment on record he never appeared at the subsequent mention on 19th October 2018 but Ms Mwangi Advocate held his brief when the hearing date for the 26th October 2018 was taken. She did not raise the issue of the alleged judgment with the court.
19. The next date when Mr. Kiminda Advocate appeared as per the record was on 2nd November 2018 and by then the matter had proceeded with Isaack Gichohi Gitaru (Protestor) Samuel Mbutia (Protestor) testifying as well as petitioner.
20. The court directed that the case of the 3rd protestor was to be heard during the scene visit at the locus in quo.
21. I have noted that on 2nd November 2018 when the court visited Gaturuturu-mahuga Othaya in the presence of Mr. Kiminda for the petitioner counsel for the petitioner did not raise the issue of there being a judgment dated 8th June 1992. He however cross –examined son to Edith who was identified to the court Edith’s portion.
22. Further, the record reflects that his client Simo Gichohi was recalled cross-examined and he re-examined him.
23. I have travelled all that journey in the proceedings just to confirm whether indeed there existed a valid judgment of the court dated the 8th June 1992 as alleged in the first ground of Appeal.
24. The issue is pertinent because if at all there was already a judgment then the court would not have had jurisdiction to reopen the matter.



25. The matter of jurisdiction is critical and must be resolved with finality. The Appellants' record of Appeal contains only one judgment appearing at the pages 64 -74. It is the judgment which is the subject of this Appeal.
26. The lower court file has submissions filed by Mr. Kiminda dated 21st November 2018. In the submissions before the Hon. Magistrate he raised the issue of there being an award that was adopted as a judgment of the court adopted on 8th June 1992.
27. The interesting bit about the position held by the Appellants before the Learned Honourable Magistrate and before this court now is that, it is only the Appellants who seem to know that there was such a judgment.
28. This is a court of record and I cannot act outside the record as it is. The handwritten proceedings in the original file start on the 5th December 2017. I do not have any proceedings before me predating then.
29. It is rather intriguing how there could have been a valid judgment on record and on the 5th December 2017, a representative of the firm of M. K. Kiminda &Co Advocates by the name Stephen, took a date at the registry for hearing on 13th December 2017.
30. On 13th December 2017, Mr. Kiminda appeared before the Hon. C.M W. Kagendo and he made an application which was allowed.
31. The matter becomes even more interesting when one looks at the original record of 24th January 2018, Mr. Stephen yet again appearing for Mr. Kiminda took dates for hearing on 5th March 2018 for summons General filed by Mr. Kiminda.
32. Lastly, on the 21st March 2018 directions were issued by the court that the matter would proceed to hearing of the protests by way of viva voce evidence.
33. In view of the foregoing and considering that the Appellants have not produced before the court the purported judgment dated 8th June 1992 and there being no such a judgment on record, I find and hold that the allegation by the Appellants is unsupported by the record and by actions of counsel for the appellants.
34. It does not appear convincing at a rate that a counsel learned in the law and his client being the beneficiary of a favourable judgment would submit to the jurisdiction of a court of concurrent jurisdiction and proceed to participate in subsequent proceedings without an order for setting aside of the previous judgment.
35. It is not enough for counsel or his client to allege that the learned Honourable Magistrate disregarded a valid judgment of the court. It was incumbent upon the appellant's counsel to include the alleged judgment in the record of appeal.
36. Indeed, that is a very grave indictment of the court and must be proved by the party alleging it.
37. The court notes that the appellant's counsel did not fulfil one of the cardinal duties of counsel which is the duty to court by ensuring that any aspersions cast against the court could be substantiated.
38. As officers of the law we must protect the justice system from public ridicule. this we must do through word and deed. We should remain cautious not to cast aspersions against courts without evidence.
39. In this matter it would have been absolutely necessary for counsel to avail any such judgment which the trial court allegedly disregarded. The Appellants hold the word of their legal representative very



highly, so that when their advocates inform them that there was a judgment that was disregarded by a court, such litigants would lose confidence in the justice system.

40. It is thus my considered view that we must be measured in our representations to avoid eroding public confidence in the justice system. It is our system and must guard it for it is the protector of all.
41. In respect of the first ground of Appeal this court finds that the same has no merit and must therefore fail.

Distribution

42. Turning on to the second issue of distribution, this court notes that the learned Honourable Magistrate had the opportunity to visit the property in question and that all those that were interested in the distribution were adequately represented and heard.
43. The property in issue was Mahiga/Gaturuturu/268, which property was owned by the deceased.
44. The evidence on record shows that the parties in this matter had been shown their respective portions by the deceased during his lifetime and occupied the same.
45. No doubt each one of them developed their respective portion and there is no evidence to suggest that there existed any unresolved boundary disputes during the deceased lifetime.
46. The deceased quite evidently was a responsible and equitable man who put the parcel of land under his four wives without discriminating against any of them.
47. The dispute on distribution stems from the fact that the Appellants believe that since Zipporah Nyakahi did not have children, then property should have been distributed to the 3 (three) wives excluding her.
48. The law requires that in the distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate See Douglas Njuguna Muigai Vs. John Bosco Maina Kariuki & Another [2014] eKLR .
49. The Learned Honourable Magistrate's decision to visit the scene in the presence of the parties afforded her a good opportunity to establish the circumstances obtaining on the ground without merely relying on the testimony of witnesses in court.
50. It is an advantage that this court does not have thus the conclusions she drew from the scene visit in arriving at her decision on the distribution must be given due weight.
51. The developments that a party has done on a particular section of the property cannot be ignored during distribution.

It is common knowledge that in a family some siblings will commence development on their respective portions of land once parents allocate them whereas others will simply sit back and do nothing. The toil of such industrious siblings cannot be in vain when the estate of a deceased person of being shaved out.

52. The court is required to ascertain if the deceased had given out portions to the beneficiaries before his demise and establish if at all they had taken possession. Further, the court would proceed to determine whether the distribution fair and lawful. See Justice A Makhandia (as he then was) holding in Paul Kiruhi Nyingi & Another Vs. Francis Wanjohi [2009] EKLK.

I hold the view that the wishes of a deceased person should be respected if the wish as expressed was not illegal, unfair, discriminatory and unjust to the beneficiaries or some of them.



53. It is quite disturbing to note that the appellants in this matter strongly hold the view that, since Zipporah Nyakahiu who was their step mother had no child, then she ought not to have been entitled to any part of the property in question.
54. This is a wrongly held notion by some African men to date. It cannot be that at this time and age persons are discrimination against on the basis of their capacity or incapacity to bear children.
55. This must be one of those customs and believes that our colonial masters way back in 1897 viewed as customary practices that were repugnant to justice and morality.
56. The Appellants need to know that Kenya has made very significant strides in the area of the rights of women in society. The said Zipporah Nyakahiu qualified to be a beneficiary.
57. If the deceased, as the evidence shows, during his life time had given the said Zipporah and the other 3 wives respective portions of land and they had occupied the same it would be inequitable to seek to deprive her of that portion.

Zipporah Nyakahiu had taken possession of her portion which prior to her death she had brought in Edith Wamuyu widow of James Gichohi.

58. The learned Honourable Magistrate was correct in her interpretation and application of the provisions of Section 35 (2) of the Law of Succession.
59. The persons who took care of the late Zipporah Nyakahiu having been gifted by her the portion she occupied during her lifetime, that property could not be lawfully be taken away from them.
60. The learned Honourable magistrate's exercise of discretion in distribution was therefore proper, fair and just.
51. I do not find any misdirection or misapplication of any principles of law on distribution to warrant this court's interference with her finding.
62. The court took into account relevant factors and circumstances thus the decision was legally sound.
63. In the end, I do not find any merit in the entire appeal. The same is hereby dismissed with costs.
64. The Appellants should be advised to embrace peace and harmony like their late father.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

No appearance for the Appellant

Ms Macharia for the Respondent

Absent for the Appellant

