Magudha v Magudha (Succession Appeal E005 of 2022)
[2024] KEHC 14862 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14862 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION APPEAL E005 OF 2022

WM MUSYOKA, J

NOVEMBER 27, 2024

BETWEEN

JULIUS ODHIAMBO MAGUDHA ..... APPELLANT

AND

GREGORY KWENA MAGUDHA ..... RESPONDENT

(An appeal arising from orders made in the ruling by Hon. T Madowo, Senior Resident Magistrate, SRM, in Busia CMCSC No. 3 of 2020, of 1st September 2022)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CMCSC No. 3 of 2020, of 1st September 2022. The grounds of appeal revolve around the trial court not recognizing that the deceased had distributed his estate inter vivos; had not properly evaluated the evidence and applied section 40 of the *Law of Succession Act*; ignored the evidence of the appellant; and finding that all the children and widow of the deceased were equally entitled to a share in the estate.

2. The orders, made on 1st September 2022, which form the basis of the appeal, were made on 2 applications for confirmation of grant, dated 28th June 2021 and 13th July 2021.

3. The deceased person, in Busia CMCSC No. 3 of 2020, Roman Magudha Maero, had died on 9th November 1990, according to the certificate of death on record, serial number 036xxxx of 13th November 2019. The letter from the Chief of Bujumba Location, dated 2nd December 2019, introduced the family to the court. It was indicated, in the letter, that the deceased had 4 sons, being Julius Odhiambo Magudha, Gregory Kwena Magudha, Bartholomayo Odhiambo Magudha and Moris Otunga Magudha. The deceased was indicated as having died possessed of Marachi/Bumala/186. It was mentioned that the family had settled on the respondent as the proposed administrator.

4. Representation to the intestate estate of the deceased was sought by the respondent. He listed the survivors of the deceased as himself, and the other 3 individuals mentioned in the letter by the Chief. Marachi/Bumala/186 was listed as the asset that he died possessed of. Letters of administration intestate were made to the respondent on 17th May 2020, and a grant in those terms was duly issued to him, dated 18th May 2020.

5. In rather curious proceedings, the appellant herein lodged an affidavit of protest, in the proceedings before the trial court, pointing out that the deceased had died a polygamist, having married twice. He argued that that fact was not brought out by the respondent. He explained that he was from the 1st house, and he was the sole child in that house. He said that the respondent was from the 2nd house, where there were 3 sons and 1 daughter. He asserted that the deceased had shared out Marachi/Bumala/186 between his 2 houses, equally, and a boundary had been affixed to delineate the 2 parcels.

6. The respondent reacted to that affidavit, by filing his own, in which he agreed with the appellant, on the configuration of the family of the deceased, but disclosed that the 1st wife was deceased, and the second alive. He asserted that the property had not been shared between the 2 families, before the deceased died. He accused the appellant of not cooperating to have the land surveyed and mapped on the ground for the purpose of the confirmation process.

7. The trial court treated the peculiar proceedings as an application for revocation of grant, and disposed of the same in a ruling that was delivered on 18th May 2021. The effect was that the appellant was appointed a co-administrator of the estate with the respondent. A grant of letters of administration, in those terms, was issued to them, dated 18th May 2021.

8. The 2 administrators then lodged separate applications, for confirmation of their grant, dated 28th June 2021 and 13th July 2021. That dated 28th June 2021 was by the respondent. He proposed equal distribution of Marachi/Bumala/186, between the 4 surviving sons, the 1 surviving daughter and the 1 surviving widow. That application was filed simultaneously with a consent on distribution, duly executed by the 5 members of the 2nd house. The appellant did not sign that consent. The application, dated 13th July 2021, was by the appellant. He proposed equal distribution of Marachi/Bumala/186, between the 2 houses, on the premise that the deceased had already so divided the property before his demise.

9. The 2 applications were canvassed by way of written submissions. In the end, the trial court, in its ruling of 1st September 2022, relied on section 40 of the *Law of Succession Act*, to share out the property equally between the 6 survivors of the deceased, being the 4 sons, the 1 daughter and the widow.

10. It was that determination, of 1st September 2022, which triggered the filing of the appeal herein, founded on the grounds that I have set out in paragraph *1* of this judgment.

11. Directions were given on 29th April 2024, for disposal of the appeal herein, by way of written submissions.

12. Both sides did file their written submissions. I have read through them, and noted the arguments made. The appellant has cited Peters vs. Sunday Post Limited [1958] EA 424 (Sir Kenneth O'Connor, P, Briggs, VP, & Sir Owen Corrie, Ag JA), Selle & Another vs. Associated Motor Boat Co. Ltd & Another [1968] EA 123, Rono vs. Rono & another [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA), In the Matter of the Estate of Benson Ndirangu Mathenge (Deceased) Nakuru HCSC No. 231 of 1998 (Ondeyo, J) and In the Matter of Nelson Kimotho Mbiti (Deceased) Nairobi HCSC No. 169 of 2000 (Koome, J). The respondent cited no authority.

13. I have also seen written submissions by an alleged interested party. Alleged because there was no interested party in the proceedings before the trial court, and no order has been made in these proceedings for joinder of any interested party. I note that the alleged interested party, in his written submissions, raises issues, relating to a will, which were not before the trial court. The alleged interested party has cited In re Estate of Benson Ndirangu Mathenge (Deceased) [2018] eKLR (Ndung'u, J) and In re Estate of Joseph Eric Owino (Deceased) [2022] eKLR (Nyakundi, J).

14. The matter is fairly straightforward, whether the trial court was wrong in distributing Marachi/Bumala/186 in the manner reflected in the impugned ruling.

15. It was not in dispute that the deceased was a polygamist. He had married twice. The 1st wife was deceased, and had had only 1 child, the appellant. The 2nd wife was alive, and had had 4 children, all surviving, being 3 sons and a daughter. The deceased died possessed of only 1 landed asset, Marachi/Bumala/186. There was no dispute on those facts.

16. The bone of contention was on how the estate was to be distributed. According to the appellant, the deceased had already shared out his property before he died, and boundaries had been fixed. His case was that there was inter vivos distribution, and the court was invited to distribute the estate in accordance with the inter vivos distribution. The respondent, on the other hand, argued that there was no such inter vivos distribution, which meant that the land was available for distribution, strictly in accordance with the prevailing law, the *Law of Succession Act*, following section 40 thereof.

17. The issue that the trial court had to consider was whether or not there had been inter vivos distribution, for if there had been such inter vivos distribution, the hands of the court would have been tied, and it would have had no option, but to distribute the property strictly following that distribution. If no proof was provided of such an inter vivos distribution, then the land would have been available for distribution strictly in accordance with the *Law of Succession Act*.

18. The question that I have to answer is whether the trial court, had before it, evidence of an inter vivos distribution by the deceased, before he died. An inter vivos distribution would involve affixing boundaries on the ground, in such a case as this, where the alleged inter vivos distribution did not involve having sub-titles created, transferred and registered in the names of the beneficiaries. See Registered Trustees Anglican Church of Kenya Mbeere Diocese vs. David Waweru Njoroge [2007] eKLR (Tunoi, Githinji & Onyango-Otieno, JJA), on what an inter vivos gift would entail. Naturally, then, evidence would be required as to when that happened, who was involved in the process, and the documentation that was generated from it, as proof of the distribution. Such evidence cannot be presented in affidavit form only, without witnesses being presented to bespeak whatever documents that would have been generated from the exercise, and to detail to the court what exactly transpired at that alleged event. The confirmation applications were prosecuted by way of written submissions. No viva voce evidence was adduced. In the absence of viva voce evidence, the trial court had no material from which it could decide whether or not there was inter vivos distribution as alleged.

19. The confirmation proceedings were contested. The 2 administrators filed rival confirmation applications. That fact alone pointed to contention and disagreement on the mode of distribution. The trial court should have treated the first application as the principal application, and the second as the protest to it. Rule 41(1) of the Probate and Administration Rules envisages that where a confirmation application becomes contentious, an oral hearing should be conducted. That is the direction that the trial court should have taken, so that it could take oral evidence on the alleged inter vivos distribution, where the witnesses presented would be subjected to cross-examination. See Charles Mutua M'Anyoro vs. Maria Gatiria [2009] eKLR (Ouko, J) and In re Estate of Samson Saina Nambisia (Deceased) [2021] eKLR (Musyoka, J). The mode of trial adopted by the trial court could not afford the appellant a

platform or forum for adducing evidence on the inter vivos distribution that he was alleging, for such could not be established through affidavits and written submissions.

20. I have perused the trial court notes, with respect to the confirmation applications, and I have noted that the directions, to canvass the 2 applications by way of affidavits and written submissions, were proposed by the parties, and adopted by the court. The trial court, therefore, ought to be absolved of any wrongdoing, with respect to the mode of disposal of the applications adopted. The applications belonged to the parties. It was their obligation to prosecute the same. They opted for the easy way out, written submissions.

21. I have said, many times, in a number of rulings and judgments, in probate matters, that in contested or contentious proceedings, written submissions are not the best way of disposal of such matters. Oral evidence is the best way forward, in terms of digging out all the relevant material required to dispose of the contentious issues. The parties herein made their own bed, they had to lie on it. The mode of disposal, that they adopted, was not forced on them. They chose it themselves, and proposed it to the court, for adoption, and it was adopted. The trial court ruled, based on the material placed on record, in affidavit form, which was inadequate to establish inter vivos distribution.

22. In In re Estate of Phylis Muthoni M'Inoti (Deceased) (2019) eKLR (Gikonyo, J), the court was faced with a similar situation. It said that a person claiming that the deceased had made a gift inter vivos to them, but the titles were not deduced during his lifetime, as was the case here, ought to demonstrate such conduct of the donor which would give the intended donee the right to enforce the gift. On the facts of that case, the court found no evidence of gifts inter vivos, for there were no consents to transfer the property, duly signed by the deceased, nor any evidence that the subdivision of the land by the deceased was intended to benefit the persons claiming. See also In re Estate of Nyachieo Osindi (Deceased) [2019] eKLR (Ougo, J).

23. The appellant herein claims that the deceased had similarly made inter vivos distribution, yet he did not present any evidence of any subdivision by the deceased, nor consents to subdivide and transfer the land, pointing to an intention to share out his property during his lifetime. It was pointed out, in In re Estate of Mutungi Rithara (Deceased) [2018] eKLR (Gikonyo, J), that although the law commands that a claim of gift inter vivos is an important consideration in distribution, the same is a matter of fact, which must be proved. It is imperative, therefore, that parties making such claims should take them seriously and tender proof rather than make generalized statements devoid of evidence. Whatever such a claimant alleges may or may not be the truth, and he must tender evidence to prove that, indeed, gifts inter vivos were made by the deceased. See also In re Estate of Zacharia Nunu Gathigi (Deceased) [2019] eKLR (Wendoh, J), In re Estate of M'Angichia Muiyo (Deceased) [2019] eKLR (Gikonyo, J) and In re Estate of Aloysius Gontaga Otundo Theodore (Deceased) [2019] eKLR (Ndung'u, J).

24. Did the trial court handle distribution of the estate of the deceased polygamist in accordance with the applicable law? The applicable law is section 40 of the *Law of Succession Act*. The property is shared out according to the number of houses, taking into account the membership configuration of each house, regarding the number of children in that house. See Munyole vs. Munyole [2022] KECA 373 (KLR) (M'Inoti, Kiage & M. Ngugi, JJA).

25. The deceased had 2 houses. The 1st house had only 1 survivor, the appellant, for his mother had deceased. The 2nd house had 5 survivors, being the 2nd wife, and her 3 sons and 1 daughter. The 1st house, therefore, comprised of only 1 unit, while the 2nd house had 5 units, making a total of 6. For purposes of distribution, Marachi/Bumala/186 should have been split into 6 units. The distribution then should have been that 1 unit of Marachi/Bumala/186 was to go to the 1st house, while the other 5 units were to go to the 2nd house. That was how the trial court should have handled the distribution,

and, indeed, that was how it handled it, which perfectly fitted with the distribution envisaged in section 40 of the *Law of Succession Act*. See Kuria and another vs. Kuria [2004] eKLR (Musinga, J), Rono vs. Rono & another [2005] 1 EA 363, [2005] eKLR (Omolo, O'Kubasu & Waki, JJA) and In re Estate of Katama Nyaki (Deceased) [2019] eKLR (Muchemi, J).

26. I shall not address the new issues raised in the written submissions by the alleged interested party, as that alleged interested party was not a party to the proceedings at the trial court, which gave rise to the instant appeal. The alleged interested party has not been joined or added to these proceedings, by an order of this court. The memorandum of appeal, dated 14th September 2022, and lodged herein on 20th September 2022, only names 2 parties, the appellant and the respondent. The alleged interested party could only come into these appeal proceedings upon joinder or addition by an order of this court. There was no legal foundation for him to file any papers herein, when he was not a party in the first place.

27. I believe I have said enough, to demonstrate that the trial court did not err in any way, in distributing the estate in the manner it did. I find no merit, therefore, in the appeal herein, for the reasons given. I shall, as I hereby do, disallow it. The consequence shall be that the appeal herein is dismissed, the orders made in Busia CMCSC No. 3 of 2020, on 1st September 2019, are hereby confirmed, and upheld. There shall be no order on costs. The appeal herein is disposed of in those terms. Let the original trial court records be returned to the relevant registry. The appeal file shall be closed. It is so ordered.

DELIVERED VIA EMAIL, DATED AND SIGNED, IN CHAMBERS, AT BUSIA, THIS 27TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the appellant.

Mr. Masake, instructed by Masake & Company, Advocates for the respondent.