



REPUBLIC OF KENYA



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**In re Estate of Esther Wambaki Njenga (Deceased) (Civil Appeal
100 of 2020) [2022] KEHC 11683 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 100 OF 2020
MM KASANGO, J
MAY 26, 2022**

IN THE MATTER OF THE ESTATE OF ESTHER WAMBAKI NJENGA (DECEASED)

BETWEEN

ALICE WARIARA NGIGI 1ST APPELLANT

JOSEPH GACHERU NJENGA 2ND APPELLANT

AND

EDWARD KARIUKI NJENGA 1ST RESPONDENT

RHODA WANJIKU NJOROGE 2ND RESPONDENT

*((An appeal from the Ruling of the Senior Principal Magistrate's
Court at Kikuyu (Hon. D.N. Musyoka, SPM) dated, signed and
delivered on 28th July 2020 in Succession Cause No. 136 of 2015))*

JUDGMENT

1. This appeal relates to the estate of Esther Wambaki Njenga (deceased). The deceased died intestate on July 23, 2006. She was survived by her children, namely:-
 1. Edward Kariuki Njenga;
 2. Rhoda Wanjiku Njoroge
 3. Alice Wariara Ngige;
 4. Elizabeth Njengo Kenyatti; and
 5. Joseph Gacheru Njenga



2. The grant of letters of administration intestate was issued on January 31, 2019 jointly to Edward Kariuki Njenga (Edward) and Joseph Gacheru Njenga (Joseph).
3. Confirmation of that grant was made by the trial court on July 28, 2020 and it is the ruling of that date which is the subject of this appeal. The appellants are Alice Wariara Ngige (Alice) and Joseph. The respondents are Edward and Rhoda Wanjiku Njoroge (Rhoda).
4. On the demise of their mother some of the beneficiaries filed separate succession causes both before the Kikuyu Magistrate's court and before the Nairobi High Court, Family Division. Those separate succession causes were all considered before the Kikuyu Magistrate's court in Succession Cause No 136 of 2015.
5. The appellants' grounds of appeal are that:-
 - (a) The learned trial magistrate erred in confirming a grant of the estate of the deceased which was valued at Kshs 50,000,000.
 - (b) The trial magistrate erred in adopting a schedule of distribution of the estate when not all beneficiaries consented to the distribution.
 - (c) The trial magistrate erred in confirming the grant in the absence of equal distribution of the estate.
 - (d) The trial magistrate erred in confirming the grant when there was a pending protest.
6. I have considered the parties written submissions in this appeal. This is the first appellate court. As such, this court is guided by what the court stated in the case *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as follows:-

“[A]n appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
7. On the first ground of appeal the appellants submitted that the trial magistrate did not have pecuniary jurisdiction to determine the matter and consequently that the trial court did not have jurisdiction over the matter ab initio. One of the cases the appellants cited in support of this grounds of appeal is the celebrated case of *Owners of The Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, thus:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
8. The reason the appellant raised the above ground of the lack pecuniary jurisdiction of the trial court was because Alice filed a “notice of objection to confirmation of grant” dated July 22, 2020. The “objection” (which should have been protest) was filed by Alice in response to the summons of confirmation of grant, dated June 24, 2020 filed by Edward. It will be recalled that a grant was issued



jointly to Edward and Joseph. The summons for confirmation dated June 24, 2020 was however filed by Edward alone.

9. The protest, (although titled objection) by Alice was made on the following grounds:-
 - (a) She was a child of the deceased but had not been included in the distribution of the estate;
 - (b) There was land in Ndeiya, Limuru which was omitted from the listed assets of the deceased; and
 - (c) The deceased's estate was worth Kshs.50 million.
10. Although the protest filed by Alice before the trial court had those three grounds as seen above, Alice in submitting on the first ground of appeal narrowed down to submitting on the trial court's lack of pecuniary jurisdiction.
11. In response to that first ground of appeal, both the respondents to this appeal, Edward and Rhoda argued that one of the succession causes filed before the Nairobi High Court Family Division Succession cause No 1803 of 2011, was transferred by the High Court to Kikuyu Magistrate's Court without the appellants raising an objection to that transfer on the ground that the Kikuyu Magistrate's Court lacked pecuniary jurisdiction.

Analysis Of First Ground Of Appeal

12. Jurisdiction is everything. I say this echoing the holding of the case *Owners of The Motor Vessel "Lillian S"* (*supra*). Jurisdiction talks of the competence of a court to entertain a matter.
13. Alice, as stated before filed an objection (protest) against the mode of distribution proposed by Edward in his summons for confirmation of grant dated June 24, 2020. The summons for confirmation of grant was before the trial court on July 7, 2020. On that date, Alice informed the trial court thus:-

"I do not know about this distribution of the estate. I am left behind."
14. Edward responded as follows:-

"I am the one who subdivided the land leaving behind Alice Wariara. But if she now wants, I will give her though she had said she did not want anything from her deceased mother."
15. Alice to that stated by Edward said:-

"I want my part."
16. The case was adjourned by the trial court for two weeks. In the intervening period, specifically on July 27, 2020, another mode of distribution was filed whereby Alice was given 0.050 Ha of the estate property.
17. There was no protest filed by any party in regard to that subsequent mode of distribution.
18. The matter was again before the trial court on July 28, 2020. All the beneficiaries including Alice but except Joseph requested their portion of the estate. Indeed, Alice who had previously filed the aforestated protest said this before court:-

"We met and agreed our brothers were to tell us what to do. I need my portion."



19. Alice did not, as can be seen raise a protest either on the grounds that she had not adequately been provided for nor on pecuniary jurisdiction. It would therefore seem that Alice had abandoned the protest previously filed. There being no protest urged by Alice, the court proceeded to confirm the grant. Alice, the very person who had filed the protest on the grounds she had not been provided for in the distribution and on the ground that the trial court lacked pecuniary jurisdiction on July 28, 2020 did not advance any submission in support of the protest. It follows that as the trial court considered the submissions on distribution, it was not moved by any party on the basis that it lacked pecuniary jurisdiction. The courts in Kenya are under the common law system. In other words, the legal system is adversarial to determine facts in the adjudication process. Alice, having abandoned her protest and insisting the trial court do proceed to award her, her portion of property of the estate, the trial court did not err in not determining the protest. It follows that since the protest was not pursued, the trial court did not err in not considering that protest. Accordingly, the first ground of appeal fails.
20. On the second ground of appeal, the appellant stated that the trial court erred in adopting distribution which was not consented to. The appellants in advancing this ground in their submissions submitted that the trial court erred to confirm the grant when both of them had not filed a consent to confirm the grant.
21. Edward did not specially submit on this ground of appeal other than referring to the difficulty he has experienced due to Joseph's refusal to agree to any mode of distribution.
22. Rhoda also, other than stating in her submission that she is comfortable with the distribution ordered by the trial court did not address the second ground of appeal.

Analysis Of The Second Ground Of Appeal

23. I will begin by addressing the issue raised by the appellant that the trial court confirmed the grant on a date that had been slated for mention. When the matter was in court on July 7, 2020

“Parties given time (2 weeks) to sort out the issue of distribution failure to which I will distribute the land/property to the beneficiaries. Mention on July 28, 2020.”
24. The court's order above speaks for itself. Although the matter was marked as a mention, the order makes it clear that if the parties failed to agree on the mode of distribution, the court would, on July 28, 2020 proceed to distribute the estate. On July 28, 2020 all parties except Joseph requested the court to distribute the estate. Joseph stated before court:-

“I have not agreed with the distribution as they have proposed. We have not met.”
25. Although it will be noted above that Joseph said the beneficiaries had not met his co-appellant, Alice confirmed that the beneficiaries had met. For emphasis I will repeat what I reproduced above, the statement Alice made to the court on July 28, 2020 thus:-

“We met and agreed our brothers were to tell us what to do. I need my portion.”
26. What does the law provide? Rule 41(1) of the *Probate and Administration Rules* provides:-

“At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant



and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

27. As I stated before, Alice seemed to have abandoned her protest or at least failed to advance it before the court. It follows that on July 28, 2020 there was no protest before the trial court.
28. The proceedings of July 28, 2020 shows that the court gave opportunity to each beneficiary to respond to the confirmation sought. By that date, the mode of distribution filed before that court on July 27, 2020 was consented to by Edward, Rhoda and their sister Elizabeth Njango Kenyatti. That mode of distribution, unlike the one proposed in the summons for confirmation dated June 24, 2020 did make provision for Alice to obtain a share of the estate property.
29. The court having given opportunity to the beneficiaries to address it on the mode of distribution it was guided by the provisions of rule 41(2) of the *Probate and Administration Rules*, which provides:-

“The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.
30. The trial court had this to say in its ruling after considering the submissions of the beneficiaries:-

“I have seen the mode of distribution dated July 27, 2020 and which some of the beneficiaries have consented to and others refused to consent to. It provides for all the beneficiaries including those opposed to the distribution. I will therefore proceed to distribute the estate of the late Esther Wambaki Njenga as per the proposed mode of distribution filed in court on July 27, 2020.”
31. It will be noted that Joseph who was the only one who orally before court raised an objection to the proposed mode of distribution by Edward did not provide to the court with an alternative mode of distribution.
32. There being no allegation of wrong doing on the part of Edward as an administrator, the trial court therefore must have been satisfied that Edward, together with Joseph would administer the estate according to the law, as provided under section 71(2) of the *Law of Succession Act*. That section provides:-

“...the court to which application is made, or to which any dispute in respect thereof is referred, may:-

 - a. if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant;”
33. It follows from the above finding that the second ground of appeal fails.



34. On the third ground of appeal, appellants stated that the trial court erred in not dividing the estate equally amongst the beneficiaries as provided under section 38, 41 and 42 of the Law of Succession Act. The only relevant section of that Act to the facts in this appeal is section 38 which provides:-

“Where intestate has left a surviving child or children but no spouse where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

35. I have considered the entire record of the trial court. What comes out of that consideration and which I noted is that Edward had constructed a permanent home on the estate property. It is not clear what structures Joseph has constructed but it does seem he has possession of some part of the estate property because there was a boundary conflict between his son and Edward which resulted in a complaint being filed with the police. That could possibly explain why Edward and Joseph were allocated .2888 Ha each. Rhoda was allocated 0.056 Ha while Alice and Elizabeth and a granddaughter of the deceased were each allocated 0.050 Ha. The term equal division in section 38 of the Law of Succession Act does not deprive the court of discretion in determining distribution. This was clearly stated in the case In re Estate of Kimitei Cherop (Deceased) [2021] eKLR as follows:-

“On the basis of *Rono v Rono (supra)* counsel urged the court to heed the caution by Hon Omollo, JA, that equal distribution principle can at times work injustice; in instances such as the present one, where there are two houses but only one surviving widow. The perfect response to this concern is to be found in the words of Hon Omollo, JA in *Rono v Rono (supra)* that:

“...I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act, cap 160 of the laws of Kenya, lays down a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality... If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section [section 40(1)] that the number of children in each house be taken into account...”

36. This succession cause has been outstanding now 16 years since the death of deceased. It can be expected in that time that Edward and Joseph could have made substantial investment on their deceased’s mother’s property. I believe it would result in injustice if that investment was brought to naught. It is for that reason I find and hold that ground three of appeal fails.

37. The fourth ground of appeal was determined above, that is, there was no protest which was urged before the trial court confirmed the grant.

DISPOSITION

38. In the light of the above, this appeal fails and is dismissed with costs. The orders staying the execution of the trial court’s ruling of July 28, 2020 is hereby vacated.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 26TH DAY OF MAY, 2022.

MARY KASANGO

JUDGE



Coram:

Court Assistant : Mourice

For appellants: - Mr Gachoka

For respondent: - Ms Kamuyu

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE

