



**In re Estate of Riba Rurii alias Riba Ruriet (Civil Appeal
E013 of 2020) [2022] KEHC 12636 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E013 OF 2020**

LW GITARI, J

JULY 28, 2022

**N THE MATTER OF THE ESTATE OF RIBA RURII
ALIAS RIBA RURIET**

BETWEEN

ALBERT MATI M'RIBA APPELLANT

AND

ANASTACIA MUTHONI RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of the Chief Magistrate's Court at Chuka delivered on November 11, 2020 in Chuka Succession Cause No 89 of 2018. The appellant has raised the appeal on grounds That:
 - a. The chief magistrate erred in law and fact and/or misapprehended the law in arriving at an erroneous decision against and without considering the evidence on record.
 - b. The learned trial magistrate misdirected himself into using wrong principals of the law in arriving at an erroneous decision when there was clear evidence tendered by the appellant in support of his case.
 - c. The learned trial magistrate further misdirected himself by not considering and sticking to the pleadings and the evidence filed and adduced by the respective parties herein.
 - d. The learned trial magistrate erred in law and fact in failing to consider the submissions dated October 12, 2020 made by the appellant on the issues for determination and the legal authorities provided thereof.



- e. The learned trial magistrate erred in law and fact by grossly misdirecting himself against the very clear evidence adduced by the parties and thereby arriving at an erroneous decision against the very elaborate and clearly legitimate interests of the appellant.
 - f. The learned trial magistrate erred in law and fact in failing to apply and follows the principle of ration decidendi and stare decisis thus ignoring the established principles of law.
 - g. The learned trial magistrate totally misdirected himself into applying unknown and/or wrong principles of the law in arriving at an erroneous and injudicious decision.
2. The appeal was canvassed by way of written submission which I hereunder summarize.

Appellant's Submissions

3. The appellant is the deceased's son and filed his written submissions on March 14, 2022. He contends that since the deceased herein died in 1978, the distribution of the subject estate should be guided by custom.
4. It was his submission that 7 acres out of the 13 acres in LR No Karingani/Mariani/528 does not constitute part of the estate of the deceased and hence should not be available for distribution in this cause. He faults the trial for not considering his evidence and maintains that he has never admitted that him and his brother John Njagi had already benefitted from the estate of the deceased and that each got 10 acres.
5. The appellant thus urged this court to allow this appeal by setting aside the decision of the trial court and any subsequent orders thereto. He also prays to be awarded costs of the appeal.

Respondent's Submissions

6. The respondent is the deceased's daughter and filed his written submissions on March 17, 2022. It was her submission that the appellant failed to demonstrate the custom of the deceased as of 1978. It was her further submission that, in any case, the issue of customary being the applicable law herein was an afterthought that should not be entertained in this appeal as the same was never raised during the hearing of the cause in the lower court.

Issue for determination

7. From the grounds raised on support of this appeal as well as the respective submissions of the parties, it is my view that the main issue for determination is whether the trial magistrate applied the wrong principles of law in arriving at his verdict.

Analysis

8. This is an appeal from the lower court. Section 50(1) of the [Law of Succession Act](#) (hereinafter the "Act") states as follows:

"An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final."



9. As an appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny before drawing its conclusion. However, the court must bear in mind the fact that it did not have an opportunity to see and hear the witnesses firsthand. [See: *Selle v Associated Motor Boat Company Limited* [1968] EA 123]

Principles applied by the lower court

10. The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the [Probate and Administration Rules](#) was enacted so that claims which are *prima facie* valid should be determined before confirmation. See: rule 41 below:-

41. Hearing of application for confirmation

- (1) 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.
- (2) 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.
- (3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the [Civil Procedure Rules](#) and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.
- (4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions



relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

- (5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.
- (6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.
- (7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away."

11. In this case, the proceedings relates to the estate of the late Riba Rurii alias Riba Ruriet (deceased) who died intestate on January 1, 1978. It is not in dispute that the deceased was survived by:
 - a. Albert Mati M'Riba – Son (appellant herein)
 - b. Anastacia Muthoni – Daughter (respondent herein)
 - c. Pascalina Ciamugere Marangu – Daughter
 - d. John Njagi Karungo – Son
 - e. Nasarina Ciandeke (deceased) – Daughter
12. The sole property comprising the estate of the deceased is land parcel known as LR No Karingani/Mariani/528. From the certificate of search produced in court, the subject land measures 4.9 Ha was registered in the name of the deceased on October 30, 2013.
13. Grant of letters of administration were issued to the respondent on September 10, 2018 and vide summons for confirmation of grant dated March 12, 2019, the respondent sought for the grant made to her to be confirmed. Under paragraph 8 of the respondent's affidavit in support of the said summons, the respondent proposed that the deceased estate be distributed as follows:
 - a. Albert Mati M'Riba – 4 ½ Acres
 - b. John Njagi Karungo - 4 ½ Acres
 - c. Anastacia Muthoni – respondent – 3 Acres
 - d. Pascalina Ciamugere Marangu – 0.5 Acres
 - e. Dominic Kibaara Mbae – 0.50 Acres



14. The form of consent to the mode of distribution was signed by all the above beneficiaries except the applicant.
15. The applicant filed an affidavit of protest which he swore on July 16, 2019 and proposed that the following distribution of the estate:
 - a. Albert Mati M'Riba – 7.00 Acres
 - b. John Njagi Karungo – 1.20 Acres
 - c. Anastacia Muthoni – respondent – 1.20 Acres
 - d. Pascalina Ciamugere Marangu – 1.20 Acres
 - e. Albert Mati M'Riba – 1.20 Acres
 - f. Kageni Mbae
 - g. James Mbae
 - h. Emily Mbae 1.2 Acres jointly
 - i. Nancy Mbae
 - j. Dominic Kibaara Mbae
16. After hearing the protest, the respondent's application for confirmation of rant dated March 12, 2019 was allowed as prayed. The applicant contends to be aggrieved by the said decision hence this appeal.
17. It is the applicant's contention that 7 Acres out of the subject estate is not available for distribution in this cause as he purchased the same from one Mr. Samuel Muliarki. According to him, sometime in 1969, the deceased sold 7 acres of the subject land to the said Mr Samuel Muliarki for consideration of Kshs 300/= cash, one cow and five goats, which he needed to pay dowry. In 1971, a surveyor visited the subject land and the same was divided into two with Mr Samuel Muliarki getting his 7 acres and the deceased remaining with 7 acres.
18. According to the applicant, he asked the deceased about the land that had been transferred to Mr Samuel Muliarki and was informed that he needed to refund KShs 900 to Mr Samuel in order to get the land. The applicant alleges that he refunded the said amount but the same was registered in the deceased's name as the applicant did not have an identification card at the time.
19. The alleged transaction was not reduced in writing, but the applicant claims that the same was witnessed by one Muguongo Rurie (the deceased's brother), one Kanga Iringo (a neighbour), and one Rauni Muriera (a village elder).
20. At paragraph 15 of the applicant's witness statement dated August 3, 2020, the applicant contends that he went to the Land Committee where he refunded Mr Samuel Muliarki a sum of Kshs 1800 as demanded and for the 7 Acres of land to be transferred to him. the applicant further contends that the land was transferred in the name of the deceased as the applicant apparently had not been issued with an national identity card and that the transfer process was witnessed by Kanga Iringo (a neighbour).



21. Rule 41 of the *Probate and Administration Rules*, cited above, is clear on what the duty of the trial court was. The trial court was also guided by the provisions of sections 107(1) and 109 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) which provide as follows:

“107(1). Whoever desires any court to give judgment as to any legal right or liability dependent in the existence of facts which he asserts must prove that those facts exist.”

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact lie on any particular person.”

22. As noted by the trial court, the applicant neither produced a sale agreement nor called the vendor, Mr Samuel or his personal or legal representative in support of the applicant’s case. The applicant’s claim that he bought the land in 1980 after the deceased had passed on in 1978. It is truly questionable why the applicant did not enforce his rights all this while. In my view, the trial court was correct to find that the applicant failed to demonstrate his entitlement to the 7 acres out of the subject estate.

23. Consequently, the applicable legal provision that should have guided the distribution of the estate in this case was section 38 of the Act as the deceased was survived with children but no spouse. The said section 38 states:

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

24. In this case, the subject estate was not shared equally. However, only the applicant disagreed with the proposal, despite him and his brother getting a bigger share than the daughters of the deceased. In my view, the trial magistrate applied the correct principles in reaching its judgment dated November 11, 2020. It also considered the evidence tendered before it and the respective submissions of the parties.

Conclusion

25. The upshot of the foregoing, is that the present appeals unmerited.

I dismiss the appeal with no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 28TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

