



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 21 OF 2018**

**RAHAB MUTHONI NJIRU**

**LYOD NJIRU NYAGA**

**ALPHAS NJIRU ISAAC**

**JOHN NYAGA ISSAC.....APPELLANTS**

**VERSUS**

**EVANSON KARIUKI NYAGAH (Suing as the legal representative**

**OF WILLY NYAGA ISAAC).....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the Ruling of Hon.S.K.Mutai (PM) delivered on 8/05/2018 in Embu Succession Cause No.474 of 2018.
2. The appellants are protestors in the succession cause and were aggrieved by the findings of the trial court in which it ruled that the Land Parcel No.Gaturi/Nembure/2283 be distributed as per the Minutes of the family meeting held on 17/02/2018;
3. The appellants being aggrieved by the decision instituted this Appeal and listed eight (8) grounds of appeal as summarized hereunder;
  - (i) The trial court failed to consider that the deceased was a polygamist and failed to invoke the provisions of Section 40(1) of the Law of Succession Act; it failed to consider that three sons from the 1<sup>st</sup> house had already been allocated five acres (5) each and the remaining five (5) acres was for the 2<sup>nd</sup> wife and her unmarried daughters;
  - (ii) The trial court ought to have heard the matter by way of oral evidence and erred by relying on documentary/minutes as evidence; there was no consent from the parties who were not present at the meeting; and erred in relying on the evidence adduced by the respondent; and erred in failing to ascertain the actual acreage of the land;
  - (iii) The trial court erred when it held that the respondent had salvaged the property by paying auctioneers costs in the sum of Kshs.55,000/-; the respondent produced no receipts as documentary evidence in support of payment; whereas the monies paid was in the sum of Kshs.1627/70 which had been paid by Naomi Wanjira;
4. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the respective rival submissions;

**APPELLANTS' CASE**

5. The appellants submitted that the deceased Kiambi Kithaka was polygamous and had eight (8) children comprising of three (3) sons and five (5) daughters; during his lifetime he gifted to each of his sons five (5) acres of land; the five (5) daughters of the deceased were to inherit what had been left for the parents after their demise; and in this instance the parents left land parcel no. Gaturi/Nembure/2283 which the five (5) daughters were supposed to share;
6. In the eyes of the law, children of a deceased person are all equal and are entitled to an equal share of the deceased's property; therefore, the three (3) sons ought not to get a bigger share than the daughters; the parcel of land measured 2.02 Ha and when shared between the five daughters of the deceased each would get approximately 1.01 acres which is a very small portion when compared to the five (5) acres already allocated to the respondent;

7. There was no documentary evidence on record that the respondent had paid auctioneers costs in the sum of Kshs.55,000/- to salvage the land;

8. In conclusion the appellants humbly urged the court to allow the appeal with costs.

### **RESPONDENT'S RESPONSE**

9. In response the respondent submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were grandchildren of the deceased and had not demonstrated the reasons entitling them to inherit from their grandfather's estate;

10. That the issue of the auctioneers costs in the sum of Kshs.55,000/- to rescue the estate was well within the knowledge of the family circle, the clan and the public at large;

11. The respondent further submitted that the trial magistrate dispensed justice in the mode of distribution by relying on the Minutes dated 20/09/2017 and 17/02/2018 of the family and clan meeting and hence adopted the resolutions of the Minutes as the mode of distribution of the deceased's property amongst the beneficiaries;

12. The appeal was superfluous and tantamount to an abuse of the court process and calculated to delay the matter indefinitely; it also had no merit and the respondent prayed that it be dismissed with costs to the respondent.

13. Case law relied on **Re: Estate of John Musambayi Katumanga (Deceased)**.

### **ISSUES FOR DETERMINATION**

14. Upon reading the parties respective written submissions these are the issues this court has framed for determination;

(i) Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are entitled to benefit from the estate of the deceased;

(ii) Whether to interfere with the trial courts mode of distribution.

### **ANALYSIS**

15. In considering the appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that the duty of an appellate Court is to evaluate and re-examine the evidence on record in order to reach an independent conclusion; in addition, the Court will as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law.

#### **Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are entitled to benefit from the estate of the deceased:**

16. The respondent contends that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are the grandchildren of the deceased and are therefore not entitled to directly benefit from the estate of the deceased; he cited the provisions of Section 66 of the Law of Succession Act (Act) and stated that the grandchildren didn't rank in priority to the deceased's children;

17. It is trite law that parties are bound by their pleadings; case law referred to is **IEBC & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR** where the Court of Appeal cited several authorities from other jurisdictions and the import of the cases was;

*'...that parties are bound by their pleadings and the court sits to hear and determine the issues and not conduct investigations or examination on behalf of the society at large;*

18. The following is an extract of the respondents' Final Submissions in the lower court where he admits that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are children of the daughters of the deceased; he also acknowledges that their mothers are deceased and further states therein that the appellants are all entitled to benefit from the estate of the deceased; his submissions read as follows;

*i) Rahab Muthoni is entitled to a share of my father's land being a daughter.*

*ii) Alphas Njiru is a beneficiary of the portion due to his late mother i.e Joyce Wanjira (a daughter of the late Isaac Kiambi)*

*iii) Lyod Mbogo is a beneficiary of the portion due to his late mother i.e Naomi Mutitu (a daughter of the late Isaac Kiambi)*

*iv) John Mbogo is a beneficiary of the portion due to his late mother i.e Grace Gatari (a daughter of the late Isaac Kiambi)*

19. The only time grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are deceased; this then entitles them to step into the shoes of their parents and take directly the share that ought to have gone to the said parents;

20. In this instance it is admitted that the mothers of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants were daughters of the intestate and were the stepsisters of

the respondent; and it is not disputed that their mothers are deceased and in the circumstances they are therefore entitled to inherit their deceased mothers' shares in the estate of the deceased estate;

21. The applicable law is also found under the provisions of Section 41 of the Act which entitles the issue of a deceased child of an intestate to take the share their parent would have taken had the parent been alive; applying the foregoing principles this court is satisfied that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> appellants are entitled to benefit from the estate of the deceased;

22. This ground of appeal is found to have merit and it is hereby allowed.

**Whether to interfere with the trial courts mode of distribution.**

23. The deceased herein had two wives and was a polygamist; ideally the distribution ought to be according to the households taking into account the number of children in each house with any surviving widow being counted as an additional unit;

24. In this instance the trial court did not apply the above mode of distribution which is captured in Section 40 of the Act; but instead chose to rely on the mode of distribution set out in the Family Minutes; the trial court did not also apply the provisions of Section 42 of the Act;

25. Section 42 of the Act contains the principle of equity and in determining the final share any previous benefit must be taken into account; in re-valuing the facts of the case this court notes from the averments made by the 1<sup>st</sup> appellant in his Affidavit of Protest is that the intestate had distributed his estate during her lifetime and had given his three (3) sons five (5) acres each; that the contentious property that is land parcel no. GATURI/NEMBURE/2283 was left to the five (5) daughters to inherit once the parents were deceased; and his proposed mode of distribution was that it be shared equally amongst the five (5) daughters;

26. The respondent on the other hand did not controvert the fact that the sons inclusive of himself had been gifted '*inter vivos*' by the deceased by bestowing them with five (5) acres each; it is noteworthy that when applying to administer the estate the respondent did not include these brothers and failed to secure their consents as required by Section 26(1) of the Act; he only involved the appellants throughout; and none these brothers have made any claim for inheritance to this subject property;

27. His proposed mode of distribution was grounded on the fact that by paying the sum of Kshs.55,000/- he had rescued the subject property from the auctioneer's hammer and was therefore entitled to a bigger share; however the court record bears no documentary evidence having been tendered to demonstrate that the respondent paid this amount to the auctioneers;

28. It is also noted that the application for the Confirmation of Grant filed by the respondent is devoid of the requisite consent from any of the beneficiaries;

29. The situation that obtains here is that when the trial court overlooked the provisions of Section 40 and 42 of the Act it was wrong in the circumstances for the trial court in distributing the estate based on the minutes of the family meeting and arrived at an unfair distribution of the subject property; with the 1<sup>st</sup> house being the beneficiaries of larger portions of the deceased's estate and the 2<sup>nd</sup> house consisting of daughters getting smaller and negligible portions;

30. The sons are already in possession of five (5) acres each therefore it is this court's considered view that upon the application of the principle of equity the subject property ought to be distributed equally between the appellants

31. For these reasons this court is satisfied that there are good reasons that warrant interfering with its decision on the mode of distribution;

32. This ground of appeal is found to have merit and it is hereby allowed.

**FINDINGS & DETERMINATION**

33. From the foregoing reasons this court makes the following findings and determinations;

34. The appeal is found to have merit and it is hereby allowed;

35. This court finds that the appellants are entitled to benefit from the estate of the deceased;

36. There are good reasons found to interfere with the trial courts ruling on the mode of distribution; the judgment of the trial court is hereby set aside and substituted with a finding that the protests have merit and are hereby allowed;

37. The Land Parcel No. **GATURI/NEMBURE/2283** to revert to its original state; and be distributed equally amongst the daughters in the 2<sup>nd</sup> house and or their legal representatives; the Grant shall be confirmed accordingly;

38. Each party shall bear their own costs of the appeal.

Orders Accordingly.

**Dated, Signed and Delivered Electronically at Nyeri this 18<sup>th</sup> day of March, 2021.**

**HON. A. MSHILA**

**JUDGE**