



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**P & A APPEAL NO. 7B OF 2018**

**IN THE MATTER OF THE ESTATE OF JAMES MUHORO**

**GICHINGIRI alias MUHORO GICHINGIRI (DECEASED)**

**MARGARET WANJIKU NDIRITU.....APPELLANT**

**VERSUS**

**GEORGE GAKUNGA MUHORO.....RESPONDENT**

**(Being an appeal from the Judgment and Order of Senior Principal Magistrate,**

**Hon. P. Mutua in Chief Magistrate court in Nyeri, Succession Cause No. 238 of 2011**

**delivered on 18/9/2018).**

**JUDGEMENT**

**Brief facts**

1. This appeal is against the judgment of Nyeri Senior Principal Magistrate in CM Succession Cause No. 303 of 2018 in which the court confirmed the grant in favour of the respondent and distributed the estate of the deceased to him as the sole beneficiary. Formerly the file was in the High court as H.C Probate and Administration Cause No. 238 of 2011 before being transferred to the Chief Magistrate's court for disposal.

2. Being aggrieved by the decision of the Chief Magistrate, the appellant lodged this appeal citing 5 grounds of appeal which can be summarised as follows:-

a) That the learned Magistrate erred in law and in fact by relying wholly on the evidence of the respondent who failed to disclose that the deceased had two wives and thus the mode of distribution should have catered for the two houses.

b) That the Learned Magistrate erred in law and in fact in failing to find that the appellant had not been served with a hearing notice to attend court when the court ruled that the Affidavit of Protest be filed thus leaving out her evidence during confirmation of grant.

3. By consent parties agreed to dispose of the appeal by way of filing written submissions.

**The Appellant's Submissions**

4. The appellant submits that the deceased is her grandfather and that his estate is ancestral land. She adds that the deceased had two wives and that during his lifetime he shared the land equally between the two households of one Wamucii Muhoro and that of Muringi Muhoro.

5. According to the appellant, the proceedings of the court dated 8/6/2018 indicate that the respondent and the beneficiaries were not in agreement on the mode of distribution of the deceased's estate. Pursuant to this, the court directed that an Affidavit of Protest be filed. The appellant contends that though she was present in court on that particular day she did not understand the dates and timelines the court had given. When she later sought to file the said affidavit of protest, she was informed by the court registry that the grant had been confirmed.

6. It is the appellant's case that she was not served with a notice pursuant to a court order made on 25/7/2018. She contends that if she and

other beneficiaries were served, some of the beneficiaries would have attended court because they were opposed to the mode of distribution proposed by the respondent. The appellant contends that despite various court orders instructing the respondent to serve them, he did not do so. She adds that the only time they were served was when the court issued witness summons against them and these were served by the Chief of the area.

7. The appellant submits that since the deceased had two wives, the mode of distribution ought to be equal between the two houses. She adds that the respondent has no right to take a bigger share than the rest of the beneficiaries. She also states that she has lived on the deceased's estate since she was a child and that she has carried out extensive developments and set out permanent structures on her portion of the land. She thus prays that the appeal be allowed and seeks the leave of the court to file the affidavit of protest.

### **The Respondent's Submissions**

8. According to the respondent, the estate of the deceased was to be shared amongst the two houses as per the wishes of the deceased in the shares as listed in the Affidavit in support of the application for Confirmation of the Grant. Further, the court gave the protestors from the 1<sup>st</sup> house ample time to file a formal protest but they failed to do so. As such, the court, while informed that two houses existed, made a determination on the mode of distribution. The respondent further contends that the appellant even though accorded sufficient time to file a protest, failed to do so and waited till the matter was determined. Thus, the appellant has come to court with unclean hands as she has disobeyed court orders.

9. The respondent further contends that the appellant failed to discharge her burden of proof at the trial court as per section 109 of the Evidence Act. Thus by failing to do so, the same cannot serve as a ground of appeal. The respondent thus adds that the attached Affidavit of Protest ought not to be allowed by the court because it has only been filed on appeal.

10. According to the respondent, the matter first came up for hearing of confirmation of the grant on 7/11/2017. When the matter came up for hearing on 8/6/2018, the matter had already come up for hearing on five occasions, to which the intending protestors had not been present. However on 8/6/2018, the court directed the intending protestors to file a formal protest and by the time the matter came up for hearing again on 18/9/2018, no formal protest had been filed. The respondent adds that he served the appellant with a hearing notice for 18/9/2018 but the appellant did not attend court nor file a protest by the said date.

11. The respondent submits that since none of the appellant's siblings or herself protested to the mode of distribution, the outcome of the court was fair and just and acceptable to both houses. Additionally, the applicant has not filed any summons for revocation of grant in protest of the confirmation of grant. As such, the respondent prays that the appeal be dismissed for lack of substance and for failure to raise pertinent issues of law and fact.

### **Issues for determination**

12. After careful analysis of the evidence and arguments of the parties, I identify the only issue for determination as to whether the appellant has established a case for interfering with the judgement of the magistrate's court.

### **The Law**

13. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

**“.....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 allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”**

14. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

15. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348**, observed that:-

**“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”**

16. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

### **Whether the appeal has merit**

17. The undisputed facts are that the deceased died intestate and that he had two wives. The respondent is a son of the deceased and the appellant is a granddaughter of the deceased. She states that her father and the respondent are step brothers, sired by the same father, the deceased herein but had different mothers. It is also not disputed that the deceased during his lifetime shared and distributed his parcel of

land AGUTHI/MURUGURU/286 measuring five(5) acres between the two households. What is in contention is the shares of the land. According to the respondent, the deceased gave the Wamucii household to which he belongs 3 ½ acres and the Muringi household to which the father of the appellant belonged 1½ acres. On the other hand, the appellant claims that the deceased shared out his property between the two households equally.

18. According to the appellant she and the other beneficiaries listed herein, did not attend court because they were not served. On perusal of the court record, the court confirmed the grant because there was no protest filed by the date the grant was confirmed. It indicated that it was satisfied that the appellant and all the other beneficiaries had been served. I have perused the affidavit of service sworn on 11<sup>th</sup> March 2019 which purports service of the hearing notice on the appellant. It is noted that it is stated that the appellant and her siblings all live in one parcel of land and that they were all served there on that day. For those who were absent, the process was pinned on their doors. Surprisingly, the process server did not mention whether any of the parties who were found in their residences signed to acknowledge receipt of the hearing notice. Acknowledging service is an integral part of court process which is known to every qualified process server. The commissioner of this important information raises doubt on service. I am of the view that if the court would have keenly perused the said affidavit, it would have noticed the anomaly.

19. However, on perusal of the Record of Appeal, particularly the Petition for Letters of Administration and the Summons for Confirmation of Grant it is noted that no consents were filed in respect of the summons for confirmation of grant and the mode of distribution. Notably, no parties have raised that point, but in the interests of justice and fairness, it is prudent to address it. In the Summons for Confirmation of Grant, the respondent lists other persons as dependants of the deceased but notably in his petition for letters of administration intestate, he did not include them. Despite including them in the summons for confirmation, he has not attached any consents, which is a mandatory requirement by the law. **Rule 26 of the Probate and Administration Rules** is clear and it provides:-

**(1) Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the same degree as or in priority of the applicant.**

**(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of communication, or written consent in Form 38 or 39, by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.**

20. Further, **Rule 40(8) of the Probate & Administration Rules** provides:-

**Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person, but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers in Form 74 to the applicant, the protestor and to such other persons as the court thinks fit.**

21. It should be noted that the consent is to be in Form 37 and further all the dependants or beneficiaries must give their consent. This was the holding of Ouko J (as he then was) in **Charles Mutua M'anyoro vs Maria Gatiria [2009] eKLR** where he stated:-

**“It is imperative under the rules that all the dependants be in attendance during the hearing of the application for confirmation save where the dependants have signed a consent in writing. See Rule 40(8).”**

22. In the instant case, the record shows that the summons for confirmation dated 5<sup>th</sup> September 2016 were filed by the respondent as well as a Further Affidavit in support of the Summons for Confirmation of Grant sworn on 12<sup>th</sup> October 2016 but did not attach any consents from the beneficiaries. Further, when the grant was confirmed, all the intending protestors/beneficiaries were not present in court. Thus since no consents by the dependants and beneficiaries were obtained, confirmation of the grant was done without due regard to the mandatory provisions of the law under the Succession Act.

23. Secondly, the Chief Magistrate's court was aware that there were beneficiaries who were aggrieved by the summons for confirmation and thus directed that they file their protests. The court also directed that the appellant file his response and statements by 20/7/2018 which was not done until 21/09/2018 after the confirmation of the grant. This raises doubt as to whether the would be protestors were served with the court's orders. Although the court said the respondent and some of the beneficiaries were present, he names of those present were not recorded. It cannot be said for certain that the appellant and her siblings were in court when the orders were issued.

24. I am of the opinion that the trial court ought to have interrogated why the respondent's household had allocated itself a bigger share of the estate than the other household which had more beneficiaries. This would have necessitated an inquiry as to why no consents were filed together with the Summons for Confirmation. Although the respondent claims that the deceased demarcated his land into portions of 3 ½ to 1 ½ acres, it is instructive to note that the court will not interfere with the said wishes unless it can be demonstrated that the wishes are illegal, unfair, discriminatory and unjust. This was portrayed by Makhandia J (as he then was) in **Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi [2009] eKLR** :-

**“Unless it can be demonstrated that those wishes of the deceased as captured in the black book were illegal, unfair, discriminatory and unjust to the beneficiaries or some of them, such wishes ought to be respected in my view. Nothing has been brought to my attention that remotely suggests that the deceased's was biased, unfair and/or discriminatory against any of the beneficiaries in the manner he wanted his estate shared out of his demise. In any event, it would appear that some of the beneficiaries were aware of the contents of the black book during the deceased's lifetime. If they were despatched with the distribution they should have taken it up with him.”**

25. I hold the opinion that the mode of distribution as proposed by the appellant for equal shares is more acceptable because it is fair and just to the beneficiaries as a whole. The respondent other than stating that he is entitled to a bigger share because the deceased so wished did not give any reasons or adduce any evidence to show that those were the wishes of the deceased.

26. It is noted that the appellant was not the sole beneficiary in the said succession cause but that seven(7) other beneficiaries were lumped up with the appellant and given 1½ acres to share out of L.R No. Aguthi/Muruguru/286. The respondent took 3½ acres for himself without any justification why the Wamucii house should get a bigger share than that of Muringi.

27. It is not in dispute that the deceased died intestate on 19<sup>th</sup> December 1981 and that the Law of Succession Act applies to this cause. Despite the failure by the appellant to file a protest on time for reasons she has explained in this appeal, the trial ought to have applied the relevant law in distributing the assets of the deceased which it failed to do. It is noted that the protest was filed a few days after the confirmation of grant. The record of the court from the onset was clear that the deceased had two houses. Even if the beneficiaries from one house did not file a protest as directed, the court had a duty to cause the said beneficiaries to be issued with curt summons with a view of ensuring that their consents were procured before the confirmation of the grant.

28. It is my finding that the court erred in failing to keenly scrutinize the affidavit of service of the hearing notice which had gaps and proceeded to confirm the grant. The court also erred in failing to ensure that Rule 40(8) of the Probate and Administration Rules was complied with. Further, the court did not ensure that the respondent had the consent of the appellant and the other beneficiaries to distribute the estate as he had proposed. The court having been aware that some beneficiaries were aggrieved ought to have ensured they were accorded a fair hearing before it.

29. For the above reasons, I am of the considered view that the appellant and other beneficiaries ought to have been heard before the grant was confirmed in favour of the respondent. It is noted that the appellant would still have obtained a remedy by applying for review or setting aside the orders made herein before the CM court. However, if this court was to so direct the appellant, it is likely that delay would occur in determination of this case. My view is that this court is possessed of the jurisdiction to issue the necessary orders having found that the trial court erred in disregarding the provisions of the law.

30. I find this appeal successful and make the following orders:-

- a) That the confirmation for grant orders made on 18<sup>th</sup> September 2018 in CM Succession Cause No. 303 of 2018 formerly Nyeri High Court Succession Cause No. 238 of 2011 are hereby set aside.
- b) The appellant and other beneficiaries are hereby granted thirty(30) days to file affidavits of protest in CM Succession Cause No. 303 of 2018 and thereafter fixed a hearing date.
- c) That each party shall meet their own costs of this appeal.
- d) The appeal stands allowed.

31. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 29<sup>TH</sup> DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Judgement delivered through video link this 29<sup>th</sup> day of July, 2021.**