REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 10 OF 2018

JANET WERUMA MURANGIRI.....APPELLANT

VERSUS

MBOGO MURANGIRI.....1ST RESPONDENT

LABAN KINYUA MURANGI.....2ND RESPONDENT

JETRUDE CIURUNJI NJIRU.....3RD RESPONDENT

JUDGMENT

1. The appellant herein instituted the instant appeal vide a memorandum of appeal dated 5.04.2021 challenging the judgment of Hon. B.M Kimemia SPM delivered on 11.12.2017. In the said memorandum of appeal, the appellant raised five (5) grounds of appeal and in a nutshell, she challenges the mode of distribution as applied by the trial court. She thus prayed that the appeal be allowed and the decision of the lower court dated 11.12.2017 be set aside and this Honourable Court do proceed to hear and determine the summons for confirmation of grant (amongst other orders).

2. The appeal was canvassed by way of written submissions. The appellant in her submissions faulted the decision of the trial court for the reasons that the trial court erred in law and in fact by misinterpreting the provisions of the Law of Succession Act pertaining to the distribution of the estate of a polygamous man and thus arrived at a wrong decision. That the deceased herein had three wives and each wife had children and at the time of filing the succession cause, the only beneficiaries who were alive were the appellant and the (three) respondents.

3. Further that some of the beneficiaries had already been given land during the lifetime of the deceased including the 1st and 2nd respondents herein and the only persons who had not benefitted from the estate of the deceased were the appellant and the 3rd respondent. As such, the trial court's finding that the 1st and 2nd houses had benefitted from the deceased' estate was wrong as the land was only given to individual children and did not benefit other children of the said houses.

4. It was further submitted that the trial court erred in ordering that the first 4 acres out of the estate (LR. Kagaari/ Kanja/1316) goes to the house of the 3rd wife without considering that the said 3rd wife was already deceased and further without considering that the children of the 3rd house that is the 1st and 2nd respondents had already benefitted from the estate of the deceased when land parcels LR. Kagaari/ Kanja/4127 and LR. Kagaari/Kanja/4128 were transferred to them. It was submitted that, as such, the same was discriminatory against the appellant and the 3rd respondent who had not benefitted at all from the deceased.

5. It was further submitted that the trial court erred in directing that the widows of the deceased's sons (Ephantus Njiru, Rufus Nyaga and Nyaga Murangiri) inherit an equal share of the estate yet the said sons had already been allocated with large parcels of land belonging to the deceased. Further that the trial court erred in holding that it was not clear whether the parcel of land allocated to the sons of the deceased prior, formed part of the deceased's estate whereas the parties were in agreement as to the said fact. As such the trial court's decision was discriminatory against the appellant.

6. The respondent on her part submitted that the appellant did not prove any of the grounds of appeal and that the trial court did not err in law or in fact in its decision and applied the evidence before it to the law. That the sharing was fair, equitable and took into consideration the interests of all the children of the deceased.

7. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). However, this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the

Court is shown demonstrably to have acted on wrong principles in reaching the findings {See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga& Another (1988) KLR 348**)}.

8. Basically, the appellant petitioned the trial court for letters of administration intestate and which was issued to her on 15.06.2011. The appellant proceeded to file for confirmation of the same vide summons dated 26.01.2012. In the affidavit in support of the same, she proposed that the estate herein (LR/ Kagaari/ Kanja/1316) be distributed equally between herself, Getrude Ciorunji, Samwel Mbogo and Laban Kinyua each getting 2.02 acres. The respondents herein proceeded to file a joint affidavit of protest against the confirmation of grant and wherein they deposed that the appellant had deliberately omitted some beneficiaries of the estate to her advantage. They listed the said beneficiaries and further deposed that those who were deceased had beneficiaries who ought to have been considered in the distribution of the estate.

9. It was further deposed that the deceased had three wives and that he had given the 1st and 2nd wives 4 acres each before he died but the 3rd wife (who had two sons 1st and 2nd respondents herein) were never allocated the four acres which had been allocated to the two families. As such, the respondents herein prayed that the 3rd family (1st and 2nd respondent) be allocated the 4 acres i.e 2 acres to each of them and the remaining 4 acres be shared equally amongst all the children of the deceased and where the son is deceased, the share be given to his spouse. The mode of distribution was listed in paragraph 12 of the said affidavit of protest.

10. The appellant herein filed a response to the said affidavit of protest and wherein she reiterated the contents of her affidavit in support of the summons for confirmation of grant. The protest was canvassed by way of written submissions and in the ruling delivered on 11.12.2017, the trial court ordered that the house of the 3rd wife to get the 1st 4 acres of the land parcel Kagaari/ Kanja/1316; the remaining 4 acres to be distributed equally to the 8 children of the deceased. The court further ordered that the children of the deceased will include the spouses of those who are deceased children of the deceased. It is this ruling which necessitated the appeal herein.

11. I have definitely analyzed the evidence which was tendered before the trial court as required by the law, I have also considered the grounds of appeal as postulated in the memorandum of appeal, the rival submissions filed herein and have read through the record of appeal.

Analysis of the law and determination

12. The legal basis of filing an affidavit of protest is rule 40(6) of the Probate and Administration Rules 1980. The said rule provides that any person wishing to object to the proposed confirmation of a grant shall do so by filing in the cause in duplicate at the principal registry an affidavit of protest against such confirmation stating the grounds of his objection.

13. In the instant case, the respondents ' case before the trial court and as I have already noted was in relation to the persons entitled to inherit from the estate of the deceased. The same is evident even in the appeal herein. As such, it is my considered view that I am invited to determine the issue as to how the estate of the deceased herein ought to be shared.

14. It is not in dispute that the deceased herein had three wives namely Monica Ciuruma, Doricas Kori and Jemima Kieni. It is further not in dispute that the deceased had eight children some of whom were deceased as at the time of the petition. The said children were born of the three wives as follows;- Monica Ciuruma begot Jetrude Ciurunji Njiru and Rufus Nyaga Murangiri (deceased); Doricas Kori begot Ephantus Njiru (deceased), Edith Igandu (deceased), Nyaga Murangiri (deceased) and Janet Weruma Murangiri and Jemima Kieni begot Mbogo Murangiri and Laban Kinyua Murangiri. Further it is not in dispute that the estate subject in this cause is land parcel Kagaari/ Kanja/1316. The deceased died on 1.04.1986 and as such, the estate is subject to the provisions of the Law of Succession Act Cap 160 Laws of Kenya by virtue of section 2(1) of the said Act. Further, it is not in dispute the deceased died intestate and thus in the absence of agreement between the parties on the mode of distribution of the estate, the distribution of the estate is governed by Part V of the Act.

15. Section 40 of the Law of Succession Act deals with the issue of polygamous families and stipulates as follows:-

Section 40 (1):-

> ***"Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."***

16. Section 40 (2):-

> ***"The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38."***

17. The deceased had three houses. Section 3 of the Law of Succession Act, defines the "house" as a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife.

18. It is not in dispute that the deceased sons who were already deceased had beneficiaries being their children (grandchildren to the deceased). The respondent's submissions in that respect were never disputed. From the petition for the letters of administration, the appellant herein indicated only herself and the respondents herein as being the persons who survived the deceased. The letter from the chief dated 27.09.2007 also indicates that the deceased was survived by the same beneficiaries. It can therefore be said that indeed Rufus Nyaga Murangiri (deceased), Ephantus Njiru (deceased), Edith Igandu (deceased), and Nyaga Murangiri (deceased) predeceased the deceased herein.

19. The effect of the above provisions is that the estate herein was supposed to be divided into three portions (as per the number of the houses). However, the said portions ought not to be equal as the law provides that the sub-division ought to take into account the number of children in each house but also adding any wife surviving him as an addition to the number of children. In the instant case, nothing is said as to whether any of the wives of the deceased survived him and whether they were alive at the time of filing the succession cause.

20. In the case of **Mary Rono –vs- Jane Rono & another [2005] eKLR**, Omollo, JA held that:-

> ***"My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.."***

21. From my perusal of the entire record it shows as to the existence of the said wives. What this means is that the estate ought to have been divided into eight equal portions and wherein the house of Monica Ciuruma would get 2 portions, that of Doricas Kori getting four portions and that of Jemima Kieni 2 portions and making the sharing ratio to be 2:4:2. That is the law. The specific houses would then proceed to distribute as amongst themselves in accordance with the rules set out in section 35 to 38. As I have already noted, some of the beneficiaries are deceased and in fact from the perusal of the records, they are not indicated as to having survived the deceased. Where there is a deceased beneficiary in any house, the distribution would be to the surviving spouse of such a beneficiary to hold in trust for the children. In this case, the surviving spouses for the deceased beneficiaries were listed in the protests and the pleadings and who were never disputed. As such, I agree with the trial court as to having ordered that the shares of the deceased beneficiaries to be registered with the spouses of those who are deceased children to hold in trust for the children.

22. However, the trial court in her decision ordered that the home of the 3rd wife to get the 1st 4 acres of the land parcel Kagaari/ Kanja/1316; the remaining 4 acres to be distributed equally to the 8 children of the deceased. The reasons for this was that the other houses had benefitted from the estate of the deceased. The 1st and 2nd respondents herein premised their protest basically on this ground and argued that they ought to be given s bigger portion for that reason. The appellant on the other hand maintained that all the beneficiaries had benefitted from the said estate save for herself and the 3rd respondent. In her submissions the appellant faulted the trial court for finding that 1st and 2nd wives had been given land by the deceased whereas in the real sense the land had been given to individual children.

23. The specific beneficiaries who were said to have been given land or rather benefitted from the estate of the deceased are;- Rufus Nyaga Murangiri who is said to have been given LR Kagaari/ Kanja/1991 measuring 1.62 Ha and Ephantus Njiru who is said to have been given LR Kagaari/ Kanja/932 measuring 4.62 Ha. The appellant further submitted that LR Kagaari/ Kanja/1317 had been subject of a suit being Nairobi HCCC No. 1277 of 1976 and which was concluded after the demise of the deceased. Further that the said land was sub-divided into three portions being Kagaari/ Kanja/4126 and which was registered in the names of Nyaga Murangiri, Kagaari/ Kanja/4127 which was registered in the names of Mbogo Murangiri and Kagaari/ Kanja/4128 registered in the names of Laban Kinyua. Copies of green cards in relation to these land parcels are part of the record.

24. Under Section 42 of the Law of Succession Act, where an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house. What this means therefore is that for any property to be taken as having been given to a beneficiary, it must have been given during his lifetime. Of course it goes without saying that the said property must be belonging to the said deceased. It is therefore prudent to consider each of the said titles and trace the ownership history.

25. I have perused the copies of the green card on record and I note that LR Kagaari/ Kanja/1991 was initially registered in the names of one Tetu Murangiri on 3.02.1961. There is entry number 2 which shows that on 7.01.1977, the same was registered in the names of Rufus Nyaga Murangiri. The remarks against the said entry indicate that it was registered as such due to correction of name. As such, it is clear that the same was not registered in the names of the said Rufus Nyaga Murangiri as a gift from the deceased herein. There is no evidence in that respect. As such, the only conclusion which can be made is that the same was not a gift by the deceased herein during his lifetime.

26. For LR Kagaari/ Kanja/932 measuring 4.62 Ha, the copy of the green card on record indicates that the same was registered in the names of one Njiru Gacigu on 3.02.1961 and on 26.07.1976 the same was registered in the names of Elijah Nyaga Njiru and James Muriithi Njiru in equal shares. It is therefore clear that the said land was not owned by the deceased herein. There is no evidence to link Njiru Gacigu to the deceased herein. The names of the deceased in this cause do not have an alias in that respect. As such, the only conclusion which can be made is that the same was not a gift by the deceased herein during his lifetime as it was not shown that the same belonged to him (deceased). Further the name Ephantus Njiru (who is the son of the deceased) and Elijah Nyaga Njiru and James Muriithi Njiru (who are the registered proprietors of the said land parcel are not the same persons.

27. As for Kagaari/ Kanja/4126, Kagaari/ Kanja/4127 and Kagaari/ Kanja/4128, the copies of the green cards thereof indicates that the three titles were sub-divisions of LR Kagaari/ Kanja/1317. The green card for LR Kagaari/ Kanja/1317 indicates that the same was initially registered in the names of Ngoroi Kandaba before a caution was registered in favour of the deceased herein wherein he claimed purchaser's interest. The appellant in her affidavit in reply to the protest annexed a copy of a decree made on 26.06.1987 and which the respondents herein did not dispute. From the said decree, it is clear that LR Kagaari/ Kanja/1317 was ordered to be transferred to the respondent herein and one Nyaga Murangiri and the same be shared in equal shares. The green cards for the resultant land parcels (Kagaari/ Kanja/4126, Kagaari/Kanja/4127 and Kagaari/Kanja/4128) clearly indicates that the said land parcels were indeed registered in the names of the respondents (and also Nyaga Murangiri).

28. What is clear from the above analysis is that;-

> **i.** LR Kagaari/ Kanja/1991 has never been registered in the names of the deceased herein and thus the same cannot be said to have been given to Rufus Nyaga Murangiri so as to be considered under section 42 during distribution of the estate.

ii. For LR Kagaari/ Kanja/932, the same was registered in the names of one Njiru Gacigu and not the deceased herein and the same cannot be considered under section 42 during distribution of the estate. Further the names of the registered proprietors thereof and the son of the deceased alleged to have been given the said land are not the same.

iii. For LR Kagaari/ Kanja/4126, Kagaari/ Kanja/4127 and Kagaari/ Kanja/4128, the same came out of LR Kagaari/ Kanja/1317 and which belonged to the deceased.

29. It is trite that he who alleges must prove. In absence of the evidence as to the said deceased sons having benefitted from the deceased, the assertions by the appellant cannot hold water. In my view, it is the 1st and 2nd respondents who can be said to have benefitted from the deceased and their share ought to be taken into account during the distribution of the estate herein. As such, the trial court erred in finding that the 1st and 2nd family had received four acres from the deceased. There was no evidence in that respect which was tendered before the court.

30. That being the case, it is my considered view that the trial court erred in distributing the estate as it did. There were no reasons or rather evidence to justify the 1st and 2nd respondents' entitlement to the first four acres of the estate herein as there was no evidence that the other two houses had benefitted from the estate of the deceased. In my view, it is the 1st and 2nd respondents who had benefitted from the estate of the deceased and the trial court ought to have taken that into consideration and factor the same in the final distribution. As such the distribution by the trial court ought to be set aside as the same was not as per the law.

31. Having decided as to who had earlier benefitted from the estate of the deceased and having found that the 1st and 2nd respondents had already benefitted from the estate, the question which needs to be answered is what ought to be the mode of distribution of the estate herein.

32. However, before I get to determine this issue, I note that the cause before the trial court involved only the appellant and the respondents. It is not in dispute that the children of the deceased (who were also deceased) had spouses and who were not involved in the process yet they are beneficiaries. The reasons for this could be because of the belief that their husbands had already benefitted from the estate of the deceased. It is my view that for the interest of justice, the lower court file ought to be remitted back to the trial court with directions that the appellant herein (petitioner in the trial court) do file fresh summons for confirmation of grant and serve all the beneficiaries. The beneficiary (ies) should then file their protest (if any). It is at this point that the beneficiaries, more so, those who were left out can express their interests.

33. As for the costs of the appeal, each party ought to bear his or her own costs.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....FOR THE APPELLANT

.....FOR THE RESPONDENT