



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 194 OF 2019**

**JANE NJOKI MBURU.....APPELLANT**

**VERSUS**

**ELIAS MWANGI NJOROGE.....RESPONDENT**

*(Appeal from the judgment of the Chief Magistrates Court at Thika A.N. Maina, SPM dated 26<sup>th</sup> November, 2019 in the Succession Cause No. 533 of 2016)*

**JUDGMENT**

1. **JANE NJOKI MBURU** (whom I shall hereafter refer to as **Jane**) has filed this appeal against the judgment of Thika Chief Magistrate's Court of 26<sup>th</sup> November, 2019. By that judgment the protest filed by **ELIAS MWANGI KARANU** (hereinafter **Elias**) was upheld and the free property of the Estate of **Njoroge Wangaruru deceased (Loc.1/Kikuyu/187)** was divided equally between Jane and Elias.

**BACKGROUND**

2. **JANE** and **ELIAS** petitioned before the Thika Chief Magistrate's Court for Grant of Letters of Administration intestate for the estate of **Njoroge Wangaruru deceased**. A Grant was issued by that court to both petitioners on 17<sup>th</sup> March, 2017. Jane filed summons for confirmation of that Grant dated 8<sup>th</sup> January, 2018. By that summons, Jane proposed the deceased property be distributed as follows:-

- Jane 3:1 Acres and Elias 1:1 acres

3. Elias filed an affidavit of protest dated 20<sup>th</sup> March, 2018. That protest was heard by the Thika Chief Magistrate's Court partly by written statements, affidavits and oral evidence. It is the resultant judgment of that court that aggrieved Jane and hence this appeal.

This is the first appellate court. It follows the principles that will guide this Court are those espoused by the case **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA1** as follows:-

*“An 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 conclusion. 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 Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally”*

4. The principles set out above should be exercised with caution as stated in the case **In re ESTATE OF JOASH ARENDE (Deceased) (2019) eKLR** thus:-

*“This Court nevertheless appreciates that an appellate 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.”*

**ANALYSIS**

5. Elias opposed the mode of distribution proposed by Jane and thereafter filed before the Thika Court his protest.

6. From the evidence, it is clear that the deceased had two wives. Elias is one of the two sons of the first house. His other brother **Mburu Njoroge** is now deceased. The second house also had two sons. Both of those sons are deceased. One of those deceased sons of the second house was husband of Jane. It would follow that Jane and Elias represent the two houses in the distribution. There is no one else claiming from the estate of the deceased.

#### JANE'S CASE

7. Jane contends that during the lifetime of the deceased at the time of demarcation, the deceased had 1.1 hectares of land which was registered in the name of *Mburu Karanu deceased* which property is parcel **No. LOC1/KIUNYU/482**. Jane further contends that the said parcel of land was for deceased's first wife, the mother of both *Elias and Mburu Karanu* deceased. For that reason, it is Jane's case that Elias from the first house cannot claim equal share of the now free property of the deceased.

#### ELIAS'S CASE

8. Elias by his protest denied that the land his brother *Mburu Karanu deceased* got at the time of demarcation of land belonged to the first house. Rather, he contended that the said property was owned by his late brother, *Mburu Karanu deceased*. He stated that both houses had utilised the deceased's free property in equal shares and had done so for a long time.

#### DETERMINATION

9. The trial court on reviewing the evidence tendered before it made a finding that there was no evidence adduced proving that *Mburu Karanu deceased* held property registered in his name on trust for the members of the family of the first house. Having made that finding, the trial court found that the only property available for distribution was the free property of the deceased which the trial court determined should be shared equally between Jane and Elias.

10. Jane at the trial court called two witnesses. The evidence of those two witnesses was discounted by the trial court. One of those witnesses was *Francis Kamau Mungai*, the Chief of Kiunyu Location. He testified in support of his letter dated 18<sup>th</sup> April, 2018 which was produced in deceased's succession cause. In that letter the Chief set out the deceased's two properties, one being registered in the name of *Mburu Karanu deceased* and the other being the deceased's free property. He stated that *Mburu Karanu deceased* obtained the property from the deceased as a son of the first house. On being cross examined, the Chief conceded that he was employed as an Assistant Chief in the year 2005, whereas the deceased died in 1967. On further cross examination, the Chief stated:-

***"I wrote a letter to the deceased's daughter-in-law (Jane), to enable her file succession cause. That is how I established the ownership of the land."***

11. The second witness who testified was *Geoffrey Ngugi Mukoha*. He stated the deceased gave *Mburu Karanu deceased's* property of 4.2 acres. He also referred to a meeting of 1981 when the surveyor subdivided the deceased's free property.

12. The free property of the deceased is the property available for distribution. That is in keeping with the provisions of **Section 3** of the Law of Succession Act. That section was considered in the case ***In re ESTATE OF JOB NDUNDA MUTHIKA (Deceased) 2018 eKLR*** as follows:-

***"21. According to section 3 of the Act "estate" means "the free property of a deceased person" while "free property", in relation to a deceased person, means "the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death." It is therefore clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated."***

13. Jane wished what the trial court would take into account of the property registered in the name of *Mburu Karanu deceased* in determining the share due to the first house, the house where Elias comes from. In other words, Jane invoked **Section 42** of the **Law of Succession Act** which Section provides:-

***"Where:-***

***(a) 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***

***(b) 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 or house."***

14. The purpose why that **Section 42** was enacted was stated to be as follows in the case ***In re Estate of RUTH WANJIKU KARUGU (DECEASED)(2021) eKLR:-***

**“I agree with the expression of Gikonyo J as to the effect of this section RE-ESTATE OF MARETE MBUI ALIAS M'MARETE M'MBUI alias JUSTUS MARETE (DECEASED).**

***“...that Section 42 of the Law of Succession Act serves two important purposes; one, it fends off selfish tendencies of human beings in seeking for double portion in the estate of the deceased. And two, it enables the court to attain equality in sharing out of the estate property among the rightful beneficiaries.”***

15. Jane however failed to prove the application of that Section to this case. Jane did not prove that the property registered in the name of *Mburu Karanu deceased* was given by the deceased for the benefit of the first house. Most importantly, as stated by the trial court, there was no evidence before the trial court proving ownership of the property by *Mburu Karanu deceased*. In the absence of such evidence it follows that this court uphold the finding of the trial court, that Elias succeeds in his protest and that the deceased's free property ought to be divided equally between Elias and Jane.

16. For the above reason, this appeal is dismissed. Each party shall bear their own costs since this is a matter between family members.

**JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF OCTOBER, 2021.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

**COURT ASSISTANT: NANCY**

**FOR APPELLANT : PRESENT**

**FOR RESPONDENT: N/A**

**COURT**

**JUDGMENT DELIVERED VIRTUALLY.**

**MARY KASANGO**

**JUDGE**