



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL NO. 57 OF 2019

**PHENEHAS NYAGA KAVURI (suing as the legal representative
of FAITH WANJIRA NJAGI (DECEASED).....1ST APPELLANT
PHYLIS WAMBUGI GICHOVI.....2ND APPELLANT**

VERSUS

**GODWIN MURITHI GICHOVI.....1ST RESPONDENT
JOSEPHINE WANJIRU NJUE.....2ND RESPONDENT**

JUDGMENT

1. The respondents herein petitioned for letters of administration with will annexed and which was filed as Embu Succession Cause No. 122 of 2010. They were subsequently issued with the grant on 22.11.2011. One Mary Muthoni Njagi also filed petition for letters of administration intestate vide Embu Succession Cause No. 309 of 2011 and the grant issued on 4.11.2011. The two matters were consolidated vide the orders of 19.07.2012. Mary Muthoni Njagi subsequently passed on and vide the orders of 31.07.2012, she was substituted with Faith Wanjira Njagi.
2. The respondents proceeded to petition for confirmation of grant and wherein they proposed the mode of distribution of the estate as per the affidavit sworn on 24.05.2012. The said mode of distribution was protested by the said Faith Wanjira Njagi and Phyllis Wambugi Gichovi (the 2nd respondent herein) and wherein they proposed the estate to be distributed as per the mode on their joint affidavit of protest. The protest was canvassed by way of oral evidence pursuant to the orders of the court of 26.09.2016. The matter was later transferred to the Chief Magistrate's Court for hearing and determination and allocated file Number Succession Cause No. 440 of 2017.
3. Faith Wanjira Njagi gave evidence as 1st objector that the respondents sold plot No. 12 Kibugu and which plot was not in the will and further sold part of LR Ngandori/Nguviu/321 and 1622 and thus she prayed that the purchasers of the said properties be evicted. In cross examination, she testified that the deceased left a will and which was in dispute and further that the respondents were the registered owners of plot 12 Kibugu and after the deceased's name was cancelled. She denied having known the Samuel Njiru Ndwiga and Luciano Mureithi Kathuri who witnessed the will. The 2nd appellant herein testified as the 2nd protestor and wherein she adopted the evidence by the 1st protestor. The protestors' case was then closed.
4. The 1st respondent herein testified as PW1 that the deceased herein had left a will and wherein he appointed PW1 and his mother as executors thereof and which will was attested by one Samuel Njiru Ndwiga and Luciano Muriithi Kathuri. He produced the said will and prayed that the estate be distributed as per the said will and that it should not be distributed as provided in the affidavit of protest. Further that Faith Wanjira had bad relationship with the deceased. In cross examination, he denied having sold Plot 12 Kibugu.
5. The 2nd respondent testified as PW2 and adopted PW1's evidence as her own. In cross examination, she testified that Plots 12 and 18 Kibugu had not been sold. Samuel Njiru testified as PW3 that he witnessed the deceased sign the will on 3.07.2009 and it was done in the offices of Ann Thungu & Co. Advocates. Luciano Muriithi Kathuri testified as PW4 and his testimony was that he witnessed the deceased herein sign the will in the offices of Ann Thungu & Co. Advocates on 3.07.2009. Ann Thungu gave evidence as PW5 that she is an advocate of the High court and that on 3.07.2009, the deceased went to her offices and requested that a will be made. That she drew the will which was witnessed by one Samwel Njiru Ndwiga and Luciano Muriithi Kathuri.
6. The trial court considered the above evidence and vide the judgment delivered on 26.02.2019, it ordered that the grant be confirmed as per the summons for confirmation of grant dated 24.05.2012. It is this ruling which necessitated the instant appeal and which appeal was instituted by way of a memorandum of appeal dated 3.10.2019 and filed in court on 4.10.2019 challenging the said judgment.

7. The appellants raised eight (8) grounds of appeal and wherein they faulted the said judgment for the reasons that the trial magistrate erred in law and in fact by confirming the grant which disinherited the deceased's daughter and favoured the grandchildren and daughter in law; by failing to subject to scrutiny the contested will and make a verdict as to its validity as per the orders of Hon. Bwonwonga J dated 26.09.2016; in making a finding that the objectors were not challenging the validity of the will whereas the same was the core of the objections; by failing to condemn the petitioners for disposing off the properties of the estate before confirmation of the grant; in distributing some of the properties of the estate which were never included in the will or in the proposed mode of distribution; and in failing to consider the appellants proposed mode of distribution and that by the wife of the deceased before her death.

8. Directions were taken that the appeal be canvassed by way of written submissions and which directions were complied with.

9. The appellants in support of the appeal submitted that the trial court erred in law and in fact in failing to subject the will to scrutiny and make a verdict as to its validity. This was irrespective of the fact that the will was made in suspicious circumstances and further despite Hon. Justice Bwonwonga having directed that parties do give oral evidence to determine the validity of the will. The appellants relied on the case of **in Re Estate of Julius Mimano (Deceased) (2019) eKLR** in support of the fact that the circumstances under which the deceased allegedly signed the will were suspicious and that the will was made under coercion, importunity, fraud or mistake and thus void. Reliance was made on the case of **in Re Estate of Julius Mimano (Deceased) (2019) eKLR** to the effect that the deceased lacked capacity under section 7 of the Law of Succession Act. Further that, the testator did not understand his actions and he could not recollect all his assets as such he mis-described some of them (e.g. Ngandori/Ngovio/1622 and Ngandori/Ngovio/321) and left out others (e.g. Plot No. 18 Kibugu market and No. 12 Kibugu Market). It was further submitted that the respondents obtained the grant of letters of administration to the exclusion of the rest of the family members (including the appellants) who ranked higher in priority than the respondents and whose consent was never sought. As such the same should be revoked as the proceedings to obtain the same were defective in substance and further that the respondents concealed facts that the properties named in the grant were mis-described. Reliance was made on Section 76 of the Law of Succession Act.

10. The appellants further submitted that they (and other children of the deceased) were disinherited in favour of the respondents herein and thus they are entitled to reasonable provisions under Section 26 of the Act and which section limits testamentary freedom. Reliance was made on the case of **Curryian Okumu –vs- Perez Okumu & 2 Others (2016) eKLR**. Further that the 1st appellant ought to be provided under the will and the respondents' evidence of the 1st appellant's conduct towards the testator was mere hearsay and that she did not tender evidence to prove the disentitling conduct by the 1st appellant. Reliance was made on the case of **Re Estate of Lusilia Wairu Waweru (deceased) (2020) eKLR**. Further that the trial court erred in law and in fact in disregarding the appellants' mode of distribution as per the amended affidavit of protest dated 21.10.2014 and upholding the appellant's mode and which was unfair and inequitable.

11. Further the trial court erred in law and in fact in failing to condemn the respondents for disposing off LR. Ngandori/ Ngovio/1622 and Ngandori/Ngovio/321 before confirmation of the grant and which acts amounted to intermeddling under section 45 of the Act. Further that the trial court erred in distributing Plot 12 Kibugu market which was never included in the will or in the summons for confirmation of grant and thus not included in the main suit. They thus prayed that the appeal be allowed and cause the scrutiny of the will as well as revoke the grant of letters of administration granted to the respondent and the matter be heard *de novo*.

12. The respondents in opposing the appeal submitted that the deceased herein left a will and wherein he appointed the respondents as executors and wherein he provided for his son Julius Gicovi Njagi, his wife Mary Muthoni Njagi, daughter Phillis Wambugi, daughter – in-law Josphine Wanjiru, grandsons Godwin Muriithi and Seebon Mukundi but left out Faith Wanjira Njagi because she had strained relationship with her and which fact was stated in the will. Further that the appellants did not challenge the validity of the will or give evidence to show that the respondents unduly influenced the deceased in distributing the estate in their favour and thus the trial court analyzed the evidence on record and as such the will was valid having met the conditions as set out in the law.

13. Further that omissions of some of the properties and misdescription of others and further misdescription of some of the beneficiaries were typographical errors and could not be grounds for invalidating the will. Reliance was made on the case of **Re Estate of sarastino M'chabari M'ukabi alias Chabari Mukabi (2018) eKLR** to the effect that a will cannot be invalidated on the grounds of error of description of either a legatee or some of the properties so long as the intentions of the testator can be clearly deduced. Further that by virtue of section 5 of the law of Succession Act, a testator has testamentary freedom and as such he cannot be faulted for leaving out some of the beneficiaries (including his daughter). Reliance was placed on the case of **Re estate of Abdulkarim Chator Popat (2020) eKLR**. The respondents as such submitted that the appeal was unmerited and prayed that the same be dismissed with costs to the respondent.

14. The jurisdiction of this court to determine appeals from magistrate courts is provided for under section 50 of the law of Succession Act and which provides that "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." As such, what is before me is an appeal from the magistrate court and being a first appeal, the duty of this court as first appellate court is now well settled. The said duty is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof and taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect (See **Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123**). The appellate court further ought not to interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga – versus- Kiruga & Another (1988) KLR 348**).

15. Under Section 78 (2) of the Civil Procedure Act, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed on courts of the original jurisdiction in respect of suits instituted therein. The Law of Succession Act having not expressly provided for the procedure on appeal, it is my considered view that the above legal authorities suffices in that respect.

16. I have certainly perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the appellants. I have indeed re-evaluated the evidence tendered before the trial court and it is my considered view

that the main issue for determination is whether the trial court erred in distributing the estate in the manner it did.

17. In support of the mode of distribution before the trial court, the respondents herein deposed that the same is as per the will which the deceased had left behind. The protestors are disputing the validity of the said will on the basis that one of the children of the deceased was disinherited in the said will and further that the will appeared to favour the respondents herein. It is my view that in the circumstances of this case, the dispute revolves around the validity of the said will.

18. Section 5(1) of the Law of Succession Act provides as thus:-

“Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.”

19. Section 5(3) provides that any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing. Section 5(4) places upon the person who so alleges the burden of proof that a testator was, at the time he made any will, not of sound mind.

20. What comes from the above is that a testator has a testamentary freedom and that so long as he is of sound mind, he can bequeath his/her estate or part thereof to any person that he wishes. Where a person challenges a will based on lack of capacity, such a person has the burden of proving the said lack of capacity. (See in **Re Estate of Gatuthu Njuguna (Deceased) {1998} eKLR** where the court quoted an excerpt from **Halsbury’s Laws of England, 4th Edition Vol 17 at page 903-904**).

21. As I have already noted, the duty of this court on appeal is to re-evaluate the evidence tendered before the trial court. I have considered the same and I don’t see any evidence that was tendered to prove that the will left behind by the deceased was not valid. The appellants’ herein failed in this test. The 1st protestor only testified as to the Plot 12 Kibugu having been sold and other parts of the estate. However, there was no evidence documentary or otherwise which was produced in that respect. The respondents on the other hand produced the will dated 3.07.2009 and called the attesting witnesses and further the advocate who drew the said will. It is my finding that from the evidence tendered before the trial court, the will by the deceased cannot be said to have been invalid.

22. I note that the appellants faulted the trial court for not subjecting the said will to scrutiny to determine its validity irrespective of the fact that the will was made in suspicious circumstances in that the circumstances under which the same was executed were suspicious and that the will was made under coercion, importunity, fraud or mistake and thus void. Further that the testator did not understand his actions and he could not recollect all his assets as such he mis-described some of them and also the names of the beneficiaries.

23. However, it is my considered view that the trial court was under no duty to do so without any evidence having been tendered as to the invalidity of the said will. There having been no evidence challenging the validity of the said will, the trial court would not have proceeded to determine the said validity. In fact the issue as to the testator having been unduly influenced or the issue of coercion or fraud was never raised in the trial court. This court cannot as such determine on the same. The appellants seem to be trying to fill in the gaps in evidence and which this court ought not to entertain. If they intended to do so, they ought to have made an application to tender more evidence on appeal.

24. It is my finding, therefore, that the trial court was right in upholding the mode of distribution as per the affidavit in support of summons for confirmation of grant. There was no evidence to prove that the will was invalid for want of capacity. The trial court’s decision cannot be faulted in that respect. As such, grounds 1, 2, 3, 6, 7 and 8 fails.

25. The appellants further raised the ground (ground 4) that the trial court erred in not condemning the respondents for disposing part of the estate before confirmation of the grant. However, despite the 1st objector having testified that Plot 12 Kibugu had been sold by the respondents, there was no evidence which was tendered before the trial court in support of the same. I say so having noted that the respondents herein denied having sold the same. It is trite that he who alleges must prove. There was no evidence to prove the same.

26. The appellants further raised a ground to the effect that the trial court erred in distributing Plot No. 12 Kibugu market which was never included in the will or in the summons for confirmation of grant and thus not included in the main suit. This means that they did not dispute that the same formed part of the estate of the deceased or rather was owned by the deceased. There having been a will distributing most of the estate of the deceased but leaving out the said plot, it means that the deceased died partially testate. Under section 34 of the Law of Succession Act, a person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect. The said plot as such falls under intestate estate of the deceased. The deceased having been survived by children without a spouse, the said plot could only have been distributed as per the provisions of section 38 of the Act and which provides that the same ought to be equally divided among the surviving children. As such, the trial court cannot be faulted for holding as such.

27. It is my considered view that considering all the above, the appeal herein lacks merit. The same is hereby dismissed. However, I note that the genesis of the appeal is a succession cause involving children of the deceased against their sister-in-law and their nephew. I order that each party bear his or her own costs.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF OCTOBER, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent