



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

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 153 OF 2017**

**IN THE MATTER OF THE ESTATE OF**

**JAMES KIARII KIRANGA (DECEASED)**

**BETWEEN**

**LUCY WANJIKU MBUGUA .....1<sup>ST</sup> APPELLANT**

**SERAH WAMBUI NJUGUNA.....2<sup>ND</sup> APPELLANT**

**JAMES KIARIE MBUGUA.....3<sup>RD</sup> APPELLANT**

**DANCAN GICHURU NJUGUNA..... 4<sup>TH</sup> APPELLANT**

**AND**

**MARY WANJIRU NDICHU..... RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. M. Ochieng, RM dated 3<sup>rd</sup> October 2016 at the Githunguri Magistrates Court in Succession Cause No. 1 of 2014)***

**JUDGMENT**

1. This is an appeal against the ruling and order of the trial court allowing the summons for confirmation of the grant of letters of administration and distributing the estate of the deceased. The appellant now appeals against that decision. Before I deal with the matters in issue, it is important to set out the history and background of the matter.

2. This matter concerns the estate of James Kairii Karanga (“the deceased”) of Mbari-ya-igi and who died on 22<sup>nd</sup> June 2002 within Komothai Location within Kiambu County. The petition was filed by Mary Wanjiru Ndichu his daughter in law. In the petition affidavit in support of the petition (Form P & 5), apart from herself, she listed the following survivors; Lucy Wanjiku Mbugua (Daughter in law), DGN (Grandson - minor), SWN (Granddaughter – minor). The deceased left one asset; Land Parcel KOMOTHAI/IGI/221 (“Plot 221”).

3. The grant of letters of administration was issued to Serah Wambui Njuguna, Lucy Wanjiku Mbugua and Mary Wanjiru Ndichu on 19<sup>th</sup> January 2015. By the Summons dated 9<sup>th</sup> March 2015, Mary applied for confirmation of the grant. She proposed that the Plot 221 be shared equally between herself, Lucy Wanjiku Mbugua and Serah Wambui Njuguna.

4. Lucy opposed the summons. She filed an affidavit of protest sworn on 21<sup>st</sup> April 2015. She deponed that the deceased died intestate and his heirs were; Lucy Wanjiku Mbugua, Mary Wanjiru Ndichu, Sarah Wambui Njuguna, Duncan Gichuru and James Kairii Mbugua and he was survived by the following:

- His wives, Ruth Muthoni Kiarri and Josephine Wambui Kiarri who had since died.
- His son, John Karanga Kiarri who was deceased and was survived by his wife, Mary Wanjiru Ndichu.
- His son, James Njuguna Kiarri who was deceased and was survived by his children; SWN and DGN.
- His son Patrick Mbugua who was deceased and survived by Lucy Wanjiku Mbugua, James Kiarri Mbugua and 6 daughters.

5. Lucy therefore proposed that Plot 221 be shared in accordance with the deceased’s wishes as follows:

- Mary Wanjiru Ndichu – ½ acre life interest
- SWN and DGN – ½ acre
- Lucy Wanjiku Mbugua – ½ acre
- Duncan Gichuru Njuguna – 1 acre
- James Kiarri Mbugua - 1 acre

6. Mary filed a replying affidavit sworn on 12<sup>th</sup> May 2015 in which she stated that lawful beneficiaries and the rightful heirs of the deceased were Mary Wanjiru Ndichu; SWN, DGN and Lucy Wanjiku Mbugua as all the estates of the sons of the deceased rank equally in priority. Her view was that SWN, DGN and James Kiarri Mbugua are the only ones entitled to inherit what their deceased father would have inherited from the estate of their deceased grandfather, that is the deceased in this case.

7. The trial magistrate directed that the matter be heard by oral testimony. As this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd [1968] E.A. 123*).

8. At the hearing, Lucy Wanjiku Mbugua (PW 1) opposed equal distribution of the deceased's property amongst the widows of the deceased's sons. She testified that the deceased had two wives and one of the wives did not have any children. In her view the deceased's farm ought to be divided into two and the part of the wife who did not have any children should be given to James Kiarie and Duncan Gichuru according to the wishes of the deceased. The other half should be subdivided among the Mary Wanjiru, Sarah Wambui and Lucy Wanjiku.

9. Francis Wahinya Mwangi (PW 2), the deceased's nephew, testified that it was the deceased's wish that the deceased's property was divided and according to the wishes of the deceased expressed to him, that half of the property which belonged to his wife who did not bear any children should be inherited by Duncan Gichuru and James Kiarie. He told the court that the property was demarcated according to the deceased's wishes.

10. Mary Wanjiru Ndichu (DW 1) insisted that the property should be divided equally among the houses of the deceased's sons. She insisted that the property had not been subdivided by the deceased during his lifetime.

11. At the end of the trial, the court concluded that the estate was to be distributed in terms of **section 39** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the LSA") which provides as follows:

*39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-*

*(a) father; or if dead*

*(b) mother; or if dead*

*(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none*

*(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none*

*(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.*

*(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.*

12. After disregarding the testimony of PW 2 that the deceased made intervivos gifts to his grandchildren, the trial magistrate concluded as follows:

*According to the table of consanguinity, the deceased grand children ought to be in priority to the deceased's daughter's in law. The said grandchildren ought to share equally amongst themselves. However, I do note that a complete list of all the deceased's grand children was never presented in court. In particular the female grand children were left out.*

*Doing the best I can, and to ensure that the matrimonial properties of the deceased's daughters in law (are) preserved, I order that (the) deceased's property namely Komothai/Igi/221 be distributed as follows:*

*Lucy Wanjiru Mbugua – 1/3 share to hold on her own behalf and on behalf of all her children.*

*Mary Wanjiru Ndichu – 1/3 share*

*SWN and DGN – 1/3 share.*

13. The memorandum of appeal dated 6<sup>th</sup> October 2017 is rather long winded and argumentative. However, the issue raised is whether the

trial magistrate erred in relying on **section 39** of the **LSA** in distributing the estate. The appellant also complained that the learned trial magistrate erred in dismissing the testimony of PW 1 and PW 2 to the effect that the deceased had already made *inter vivos* gifts to his grandchildren. The respondent's position is that the deceased died intestate and that the deceased's estate should be subdivided in accordance with **section 40** of the **LSA**. He supported the decision of the trial magistrate that there was no evidence that the deceased had given *inter vivos* gifts.

14. It is possible for a person to distribute properties during his/her lifetime. **Section 42** of the **LSA** makes provision for this and it provides:

*42. 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.....*

*That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.*

15. The aforesaid section of the law seeks to protect, respect and preserve the deceased wishes which were executed and undertaken by deceased persons during their lifetime. It must be noted though that person has an option to make a written or oral will to ensure that his wishes are carried out in death hence in order to prove an *inter vivos* gift, mere wishes expressed are not enough, the deceased must have taken positive steps to actualize the gift during his lifetime. That is why the law as summarized in **Halsburys Laws of England, 4<sup>th</sup> Ed, Vol 20 (1) para. 64** dealing with incomplete gifts, states as follows:

*If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.*

16. There was a suggestion by PW 1 and PW 2 in their testimony that the deceased expressed his wishes as to how the property was to be distributed but this was disputed and the learned magistrate in fact found this evidence unreliable. I have reviewed the evidence and I find that the witnesses did not prove that on the balance of probabilities that the deceased had distributed his property during his lifetime in light of the principle I have outlined above. First, the circumstances under which the deceased called his family members to discuss the division of the property were not clear. Was it a formal function or was it mere communication? Secondly did the deceased demarcate the land specifically and settle each of the adult beneficiaries on specific identifiable portions of the property at the time and have the beneficiaries lived on those portions from that time? The questions I have raised are not answered by the evidence hence I am unable to say that PW 1 and PW 2 established a case for *inter vivos* gifts.

17. Having reviewed the evidence afresh, I find and hold that the deceased died intestate. He was a polygamous man and that his estate was subject to distribution according to **Part V** of the **LSA** dealing with intestacy.

18. **Section 39** of the **LSA**, which I have set out above, contemplates a situation where the deceased dies without a surviving spouse or children. In this case, the deceased had wives and children and although they were deceased, the survivors of the wives and children were entitled to inherit the estate and hence the applicable provision was **section 40** of the **LSA** which stipulates as follows:

*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.*

*(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.*

19. Since the deceased's wives were deceased and in light of the aforesaid provisions, the direct beneficiaries of the deceased estate were his sons John Karanga Kiarri, James Njuguna Kiarri and Patrick Mbugua who are all deceased but are entitled to the estate in equal shares. I would point out that one of the deceased's wife, Josephine Wambui Kiarri, did not have any children. If the deceased pre-deceased her, her interest in his share would be a life interest and upon her death it would terminate and the property would revert to the deceased's estate and be distributed to the remaining children of the deceased. In the circumstances, the deceased's three sons were entitled to the deceased's estate in equal shares. The trial magistrate reached the correct conclusion through the wrong path.

20. Turning to the case at hand, the beneficiaries of the deceased estate are as follows:

- Mary Wanjiru Ndichu the surviving wife of John Karanga Kiarri.
- SWN and DGN the surviving children of James Njuguna Kiarri
- Lucy Wanjiku Mbugua the surviving wife of Patrick Mbugua

21. I dismiss this appeal. I affirm the decision and I direct as follows, that the estate of the deceased being KOMOTHAI/IGI/221 shall be distributed as follows:

(a) Mary Wanjiru Ndichu – 1/3 share (Life interest)

(b) SWN and DGN – 1/3 share equally.

(c) Lucy Wanjiku Mbugua – 1/3 share (Life interest)

22. Since this is a family matter there shall be no order as to costs.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KIAMBU this 29<sup>th</sup> day of JANUARY 2020.**

**J. N. ONYIEGO**

**JUDGE**

Mr Oluoch instructed by G. E. O. Oluoch and Company Advocates for appellant.

Mr Kabura instructed by Maina Karuga and Company Advocates for the respondent.