



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO.65 OF 2013

LUCIA KARIMI MWAMBA.....APPELLANT

VERSUS

CHOMBA MWAMBA.....RESPONDENT

(Being an appeal against the judgement of Hon.T.M.Mwangi – Senior Resident Magistrate in the Gichugu SRM’s Court Gichugu succession cause No.26 of 2009 delivered on 24th August, 2011)

JUDGMENT

1. This appeal arises from succession cause No.26/2009 in the matter of the estate of MWAMBA NGARI [deceased] who died on 11.8.2002. A Petition for Letters of Administration was filed by LUCIA KARIMI MWAMBA. The Objector CHOMBA MWAMBA filed a caveat and objection to making a grant dated 13.7.2009. The objection was based on the grounds that the Objector is the father of the deceased and that the deceased was survived by five sons and four daughter and he had made his wishes before he died and had sub divided the estate among the objectors. He died before the transfer was effected. He also contends that the Petitioner did not consult the objectors nor did she inform them when applying for Letters of Administration. He also raised the issue that the Petitioner and the other daughters were married.

2. The Objector also filed a petitioner by was of cross-petition and an affidavit of protest sworn on 24.3.2011. The matter proceeded for hearing before the trial Magistrate and judgement was delivered on 24.8.2011 to the effect that the;

- ***Land parcel No.KABARE/MUTIGE/54 be sub-divided into five equal portions and a portion be transferred to each of the five sons of MWAMBA NGARI NGIRIA [deceased] named in paragraph 10 of the affidavit of protest.***
- ***Each above stated beneficiaries to occupy the portions they have been occupying since year 1997.***
- ***Each party to bear it’s own costs.***

3. The appellant LUCY KARIMI was dissatisfied by the judgement of the trial Magistrate and has appealed against the entire judgement on the following grounds;

1. That the learned Magistrate erred in law and in fact in deliberating upon an estate which value exceeds Kshs.100,000/=.
2. The learned Magistrate erred in law and in fact by holding that the deceased herein had left some wishes over the distribution of his estate whereof the exhibits produced by the respondent were not proven that he was the maker of the same.
3. That the learned Magistrate erred in law and in fact by failing to consider that the deceased herein died after the law of succession came into force and that the customary law was not applicable herein.
4. That the learned Magistrate erred in law and in fact by discriminating the appellant and her sisters in regard to their gender.
5. That the learned Magistrate erred in law and in fact by holding that the deceased distributed his estate and left himself and his elderly wife landless.
6. That the learned Magistrate erred in law and in fact by applying the wrong sections and principles of the law of succession Act.
7. That the learned Magistrate erred in law and in fact by considering the evidence produced by the respondent and his witnesses and entirely or wrongly disregarding the evidence by the appellant and her witness.

She prays that the appeal be allowed.

4. The appeal was canvassed by way of written submissions. The appellant submits that the estate of the deceased comprised of land parcel No.KABARE/MUTIGE/54 measuring about five (5) acres though it is submitted that the value of the land was given as Kshs.100,000/= at the time of filing, a perusal of form P&A 5 affidavit in support of petition for Letters of Administration, para.-6- the total estimated value of the estate was given as five hundred thousand (Kshs.500,000/=) only. This permits the appellant to raise the issue of jurisdiction.

5. It is submitted that the trial Magistrate proceeded without jurisdiction. She cites Section 48 of the Law of Succession which limited the pecuniary jurisdiction of Magistrates to Kshs.100,000/=. This was before the amendment effected under Act NO.26/2015 to bring in tandem with pecuniary jurisdiction under Section 7(1) of the Magistrate's Court Act 2015 Section 48 of the Law of succession Act provided as follows before the amendment.

“Notwithstanding any other written law which limits jurisdiction but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine disputes under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed Kshs.100,000/=”.

The applicant submits that the trial Magistrate acted without jurisdiction. She relies on the estate of Simon Oyoo Achieng [deceased] 2019 eKLR where Justice Karanja stated that the trial Magistrate had no jurisdiction in dealing with an estate whose value exceeded Kshs.100,000/=.

6. The appellant argued the rest of the grounds together and submits that the deceased died intestate and had nine children, five sons and four daughters. It is submitted that the trial Magistrate was wrong in reaching a conclusion that the deceased having shown the sons portions on the land it amounts to gift inter vivos. That the trial Magistrate erred by failing to distribute the estate as provided under **Section 38 of the Law of Succession Act** and discriminated the appellant and her sister who are daughters of the deceased on the basis that they were married.

Based on these she urged the court to allow the appeal and re-distribute the estate. She refers this court to the decision of Justice Mumbi Ngugi in the estate of **CHEPKWONY ARAP ROTICH**

7. For the respondent, it is submitted that form P&A 5 indicated that the value did not exceed Kshs.100,000/=. He submits that there was no valuation report produced by the parties to show that the value exceed what was indicated on the form and the ground must fail. It is further submitted that the deceased had wished his land parcel No.KABARE/MUTIGE/54 be sub divided into five portions. That the applicant did not object to the production of the document. That she admitted that the deceased had shown the respondent and his brothers each a respective share. He submits that the deceased was free to distribute his properties during his lifetime. He relies on the case of **PETER M. MURUNGI & ANOTHER –VS- ELIUD GATONE MWONGERA & ANOTHER 2016 eKLR** where it was stated;

“These principles of none discrimination and equity (equality) are applicable in an intestate estate. The question that arises is will the court apply the same where a deceased has already expressed his intention by dividing his property and settled his children in his lifetime, where a deceased has actually advanced a gift during his lifetime.

I do not think such a gift can be subject to the said principles of equity or equality. Inheritance is not a right. It is a privilege. One can deal with his property as he wishes during his lifetime including giving it out to charity or anyone he wishes. The right to claim as a beneficiary only arises after one has died and still has free property to his estate. If person has settled (given) the whole or any part of his property during his lifetime and no one has questioned his actions during his lifetime, such a person or beneficiary cannot turn around after the demise of the person who has already settled his property and claim that there should have been equality.

A parent may decide to give any of his children a greater portion of his property than the others depending on the relationship he/she has with the children”.

The respondent submits that the deceased had settled his sons to their respective portions during his lifetime and the appellants did not question him. They cannot turn around and claim land which has been distributed. The respondent further submits that the trial Magistrate did not discriminate the applicant and was right in finding that Section 38 of the Act was not applicable as there was no property to be distributed.

8. I have considered the appeal and the submissions. There is no dispute that the appellant and her sisters as well as the respondent are children of the deceased.

In the affidavit of protest, affidavit in support of the summons for confirmation of grant and even the Chief's letter there is consensus that the deceased was survived by the following;

JAMLECK NGARI MWAMBA - SON

EPHANTUS CHOMBA MWAMBA - SON

EVAN WAMUTU MWAMBA - SON

RICHARD MUCHIRA MWAMBA - SON

HELLEN WANJIKU MBOGO - DAUGHTER
JOSEPHINE WAKABA MUGO - DAUGHTER
LUCIA KARIMI MWAMBA - DAUGHTER
BEATRICE WARUI MUCHIRA - DAUGHTER

9. There is also no dispute that the estate of the deceased comprised of land parcel KABARE/MUTIGE/54 though the protestor produced documents to show that consent of land control obtained by the deceased to sub divide the land parcel No.KABARE/MUTIGE/54 into five portions of 0.41ha each a certificate of official search dated 11.12.2008 shows that the land is in the name of the deceased. Though the consent was given on 4.11.1997, the mutation forms bear the date of 21.5.2009. The sub division does not seem to have been done and the property remains the estate of the deceased. The Act defines estate as follows;

“estate” means the free property of a deceased person”

It is property which was lawfully owned by a deceased person during his lifetime and with respect to land it must refer to land which the deceased was registered as the proprietor and is free from any encumbrances on the title. The land parcel No.KABARE/MUTIGE/54 is in the name of the deceased and is free property as defined under the Act.

10. On the other hand the deceased died on 11.8.2002. ***Section 2(1) of the Act*** provides;

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

The law of succession Act is the applicable. The Petitioner filed this cause as an intestate succession. The cross petition is also in the estate of the deceased. There is therefore no dispute that the deceased died intestate.

11. The issues which arise for determination are;

1. Jurisdiction
2. Distribution of the estate

JURISDICTION

Like in other civil disputes pecuniary jurisdiction of the trial Magistrate is derived from the statute and the value of the subject disclosed in the pleadings determines whether the court has jurisdiction or not. A judicial officer has a duty to determine whether he has jurisdiction or not if he lacks if he must down its tool.

In the case of ***MOTOR VESSEL LIHANS –VS- CALTEX OIL KENYA LIMITED (1989) KLR -1- Justice Nyang’i*** stated that;

“jurisdiction is everything. Without it a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

.....it is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction

The trial Magistrate erred by failing to ascertain whether she had jurisdiction. As I have pointed out, the form P&A 5 at para.6 had indicated that the estimate value is Kshs.500,000/=. The matter was filed in the year 2009 and judgement was rendered on 24.8.2011. During this period, Section 48 (1) of the Act had given the Magistrates jurisdiction to determine;

“any dispute and pronounce such decree and make such orders therein in respect of nay estate the gross value of which does not exceed the one hundred thousand shillings”

The jurisdiction has since been enhanced with an amendment of the Act which was done in 2015. It does not apply to a grant issued in 2011. The trial Magistrate erred by entertaining a matter which he had no jurisdiction. The proceedings were a sham and the grant issued was null and void for want of jurisdiction. This ground is meritorious.

12. The 2nd issue is distribution of the estate. The spirit of the Law of Succession Act is equal distribution of the estate amongst the rightful beneficiaries. This buttresses the constitution which advocates for equality and none discrimination. ***Article 27 (1) (2) (3) & (4) of the Constitution*** provides;

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Section 38 of the Law of Succession Act provides;

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

The Act talks of children and does discriminate on gender. The courts are under a duty to ensure equality in the distribution of the estate of the deceased to the beneficiaries. The court is given wide discretion to make provision for dependants who are not adequately provide for by will or on intestacy. This is provided under Section 26 of the Act and 27 provides;

26. Provisions for dependants not adequately provided for by will or on intestacy

Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.

27. Discretion of court in making order

In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

So like in this case where it was alleged that the deceased had distributed his estate, the petitioners were not without remedy as the court had a wide discretion to make provision having found that they were children of the deceased and therefore dependants and there was free estate of the deceased available for the distribution.

13. The appellant and her sisters ranked in equal priority with the respondent and his brothers. Section 29(a) of the Act provides;

For the purposes of this Part, “dependant” means

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

14. The parties fall in the category of dependants who are entitled to the estate as of right without any requirements of proof that they were being maintained by the deceased or not. The trial Magistrate erred by denying them a share of the estate.

15. I will now turn to consider whether the trial Magistrate’s decision that the appellants were not entitled to the estate.

16. At page 28 line 25 the trial Magistrate stated;

“On the other hand the 3rd administrator has dismally failed to prove that she and her sister are entitled to a share of the deceased’s estate”

The trial Magistrate erred by requiring the appellants to prove that they were entitled to the estate. Section 29 entitles them to the estate as of right. The appellants had a lawful claim to the estate and it was therefore preposterous for the trial Magistrate to hold that their claim to a portion of the estate was misconceived.

17. The trial Magistrate erred by declaring that Section 38 of the Act does not apply. Firstly, the estate was governed by the Law of Succession Act as provided under Section 2(1) which I have quoted above. Where a court fails to apply clear provisions of the Law it is recipe for chaos which this court cannot entertain. A court of Law must apply the law which has been passed by parliament. The intention of parliament was to ensure that male and female children get equal share of the estate without discrimination and that is the reason behind Section 38 of the Act talks of children without distinction whether they are sons or daughters. The trial Magistrate was alive to the fact that the issue was distribution of the estate and did not indicate the law which she applied at the end of the day.

The appellants and her sisters were discriminated contrary to the international convention which outlaw discrimination against women. The

convention on the elimination of all forms of discrimination against women CEDAW which this country has ratified and now forms the Law applicable in Kenya as provided. Under **Article 2 (6) of the Constitution** outlaw any form of discrimination against women. It is an international legal instrument that requires countries to eliminate discrimination against women in all areas and promotes women's equal rights. Courts should be in the forefront and lead the country to eliminate discrimination against women in all areas.

18. I must point out with respect to the learned Magistrate, that she misconstrued the term gifts intervivos. This is provided under **Section 42 of the Act**. It provides;

(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, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

There are operative words which are paid, given, settled, appointed awarded. It refers to properties which deceased has in his life time given out to a beneficiary and it no longer forms part of his estate. The marginal notes of the Section clearly demonstrates this as it states – previous benefits to be brought into account. This is what the judge was saying in **Peter M. Murungi & Another –Vs- Elud Gitone Mwongera & Another** which I have quoted above. A gift inter vivos is given and settled for the beneficiary and does not form the free estate or net estate. There must be evidence in gift inter vivos that the gift was granted by deed, payment or by executing a transfer. The gift inter vivos must be complete during the life of the deceased.

In this case the deceased had not given the estate to the sons during his lifetime. He applied for sub division but never transferred the land to his sons. Though he pointed out where each of the sons could occupy, the land remained in his name. It was property which formed free estate of the deceased and was available for distribution. It did not form a gift inter vivos for the sons only as there was evidence that even the deceased and his wife continued to live on the land even after he applied for sub-division. The trial Magistrate erred by holding that it was a gift inter vivos. Even if the sons were occupying the land since the appellants were children of deceased who were claiming a rightful share, the option was not to deny them a share, **Section 26 & 27 of the Act** called upon her to exercise discretion and make provision for them. **Section 28** gives the circumstances which the court could consider.

IN CONCLUSION

The trial Magistrate acted in the matter without jurisdiction in view of the stated value of the subject matter. The judgement cannot stand as the trial Magistrate failed to make provisions for the appellant who were beneficiaries entitled to the estate of the deceased. I find that the appeal has merits and so I allow it. I order that;

1. The judgement of the trial Magistrate is set aside.
2. It is substituted with an order that the appellant and her sisters who are daughters of the deceased are entitled to a share of the estate as provided under **Section 38 of the Law of Succession Act**.
3. The appellant was claiming two acres for the four daughters. They were willing to get a smaller portion than the sons. The appellant and her sister are married and have not utilized the land for a long time unlike the respondents who have lived on the land and developed it extensively. I should make provision for the appellants.
4. The estate of the deceased land parcel No.KABARE/MUTIGE/54 shall be distributed as follows.

HELLEN WANJIKU MBOGO

JOSPHINE WAKABU MUGO

LUCIA KARIMI MWAMBA

BEATRICE WARUI MUDURA.....1 ACRE JOINTNLY

JAMLECK NGARI MWAMBA

EPHANTUS CHOMBA MWAMBA

EVAN WAMUTU MWAMBA

RICHARD MUCHIRA MWAMBA

JAMES MUGO MWAMBA.....4 ACRES JOINTLY

Each party to bear it's own costs.

Dated and delivered at KERUGOYA this 23rd day of January 2020.

L. W. GITARI

JUDGE