



**REPUBLIC OF KENYA**

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

**SUCCESSION APPEAL NO. 150 OF 2017**

**IN THE MATTER OF THE ESTATE OF MACHARIA MUGUIMA (DECEASED)**

RACHEAL NJOKI KAMAU.....1<sup>ST</sup> APPELLANT

NDUTA KAMAU MACHARIA.....2<sup>ND</sup> APPELLANT

VERSUS

KAMAU MACHARIA.....RESPONDENT

**J U D G M E N T**

1. This Appeal arises from the Judgment of Omodho (RM) delivered on 7<sup>th</sup> July, 2017 in P&A No. 4 of 2014 at the Thika Chief Magistrate's Court. In his judgment the learned magistrate ordered that the deceased's estate be distributed equally amongst nine beneficiaries. The Appellants are aggrieved by the said Judgment and have filed this appeal. Their Memorandum of Appeal filed on 5/10/2017 raised the following grounds of appeal:-

- “a. The Learned Magistrate erred in law and in fact in declaring that the late Macharia Muguima was survived by 9 beneficiaries whereas it was clear in evidence that there were only 3 proven beneficiaries.*
- b. The Learned Magistrate erred in law and in fact in failing to find that there was no proof of the existence of 6 beneficiaries presented by the petitioner to benefit from the Estate.*
- c. The learned magistrate erred in law and fact in failing to sufficiently consider the evidence adduced in court and further in failing to apply the same in her judgment.*
- d. The learned magistrate erred in fact in basing part or the whole of her judgment on presumptions as opposed to evidence presented before her.*
- e. The learned magistrate erred in law and in fact in failing to partly or wholly consider the submissions of the Appellants.*
- f. The learned magistrate misdirected herself in declaring that the Estate of the deceased be shared equally among all beneficiaries as opposed to equally among the two houses of the deceased as requested by the petitioner in his evidence in chief and submissions or equally among the 3 proven beneficiaries as prayed by the Protestors”.*

2. During the hearing at the trial court, **Nduta Kamoi Macharia** had testified that she was married to Kamoi Macharia the intestate's deceased son. She identified others who survived the intestate as **Ann Keraiku** and **Kamau Macharia**. She testified that she did not know the other beneficiaries listed in the Petition. Rachael Njoki Kamau testified that she only knew three beneficiaries to the estate of deceased.

3. **Kamau Macharia** testified as the Petitioner. He testified that the deceased was polygamous; that the 1<sup>st</sup> house had four children and the 2<sup>nd</sup> had four and that all the beneficiaries should inherit equally. **John Maina Kamau** testified as Petitioner's witness. He stated that he is a neighbor to the Petitioner and that the intestate's 1<sup>st</sup> wife had four sons while the 2<sup>nd</sup> wife had four sons and one daughter. A third witness **Ndungu Mwangi** testified that the intestate had two wives, one of them Wanjiru, the mother of the Petitioner and 4 others.

4. The parties filed their written submissions in arguing the appeal.

**Appellants' submissions**

5. The Appellants filed their submissions through their counsel on 26<sup>th</sup> February, 2018. Counsel submitted that there was no persuasive evidence to prove that the deceased left nine beneficiaries. He contended that only the Appellants and the Respondent appeared in court and apparently before the chief who wrote the introduction letter; and that none of the contested beneficiaries testified to prove their existence and/or alleged dependency. Counsel submitted that the trial court failed to properly analyse the evidence that was placed before it in arriving at the judgment and proceeded to distribute the estate in a manner that was not fair. The court was urged to find that there are only three beneficiaries to the estate and to set aside the said judgment.

#### **Respondent's submissions**

6. The Respondent in his written submissions filed on 27<sup>th</sup> April, 2018 submitted that he is fully satisfied with the learned magistrate's judgment. He emphasized that the deceased was survived by nine beneficiaries as listed in the chief's letter which was not objected to by the Appellants. As such the court should uphold the lower court's judgment.

7. The court has considered the rival submissions and the record of the court below. In **Selle v Associated Motor Boat Co. [1968] EA 123** the Court of Appeal for East Africa laid down the principles guiding the exercise of the jurisdiction of the first appellate court. The court stated:

***“An appeal to this Court from the 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 conclusions 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 in not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities or materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamid Saif v. Ali Mohamed Sholan [1955] 22 EACA 270).”***

**See also Peters v Sunday Post Limited (1958) EA 424; Williams Diamonds Limited v Brown (1970) EA. 1.**

8. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

***“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”***

9. The key questions on this appeal are firstly, the identity of beneficiaries entitled to benefit from the estate of the deceased, and secondly the manner of distribution of the said estate. Undoubtedly the deceased was polygamous and died intestate. The deceased herein died in 1958. According to the letter by the Chief **Gathaite Location** dated 1/11/2013 the deceased died in 1958 and was survived by the following:-

1. Ngamate Macharia - Son
2. Ngige Muguima - grandson
3. Nduta Kamoi - daughter
4. Rachel Njoki Kamau - daughter
5. Mwangi Macharia - son
6. Kamau Macharia - son
7. Njoroge Macharia - Son
8. Patrick Kariuki Macharia - son
9. Virginia Wamuhu - daughter
10. Njogu Wairimu - grandson

10. He died possessed of a 4 acre land parcel, being LR NO.CHANIA/KANYONI/508. In the petition filed on 25<sup>th</sup> January 2014 the Petitioner **Kamau Macharia** who is the Respondent herein listed the persons in the chief's letter as those who survived the deceased.

11. Although **Rachael Njoki Kamau (Rachael) and Nduta Kamoi Macharia (Nduta)** the Appellants herein and Protestors in the court below) had initially objected to the issuance of a grant to the Petitioner, on 16.10.15 the parties consented to the issuance of a limited grant jointly to the Petitioner, **Rachael, Nduta, and Peter Njoroge Machaia**. Subsequently, a summons for confirmation of grant was filed on 20<sup>th</sup> May 2015, listing all the ten beneficiaries in the Petition, and proposing that each house receive half share of the estate.

12. Only the Petitioner, **Patrick Kariuki Macharia** and **Virginia Wamuhu** signed consents thereto. In opposition to the summons, **Rachael** and **Nduta** filed affidavits of protest on 11<sup>th</sup> August 2016. Therein, and by their subsequent evidence, they disputed that the following persons were rightful beneficiaries to the estate:

- a) Ngamate Macharia
- b) Ngigi Muguima
- c) Njogu wairimu
- d) Mwangi Macharia
- e) Peter Njoroge Macharia
- f) Patrick Kariuki Macharia
- g) Virginia Wamuhu Macharia

13. They however admitted that the Petitioner, **Kamau Macharia** was the son of the deceased. For his part the Petitioner admitted that the Protestors were widows of the deceased sons of the intestate. In his evidence-in- chief, the Petitioner stated that all the children of the deceased are dead, save for himself, **Peter Njoroge** and **Virginia Wamuhu**, all being children of the deceased's wife Wanjiru, who were still living.

14. During cross-examination he disowned the beneficiary **Njogu Wairimu**, asserting that he was unknown to him and that his name was introduced by the son of **Nduta** also known as **Njogu**. However, he explained that **Ngamate Macharia** was the deceased son of the house of **Wambui** and that **Ngigi Muguima** was a son of deceased **Muguima Mwangi** of the first house. The remainder of the disputed beneficiaries were alleged children of his mother. These are Mwangi Macharia (dead), Peter Njoroge (alive), Virginia Wamuhu (alive), Patrick Kariuki (deceased). Surprisingly, neither these allegedly living disputed beneficiaries, nor Ngigi Muguima s/o Muguima Mwangi (deceased) son of first house, nor any widow or child of **Ngamate Macharia** (first house) gave evidence.

15. The evidence by the Petitioner's two witnesses appears shaky as the witnesses admitted gaps in their knowledge of the family members. The chief who prepared the letter introducing the beneficiaries to the estate was not called as a witness. On their part, the Protestors asserted that all the disputed beneficiaries were strangers to the estate and unknown to them.

16. Section 107 of the Evidence Act provides that:

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

17. The Petitioner is the person who introduced the disputed beneficiaries in the Petition and was duty bound to adduce evidence of their status. It is not an answer to the Protestors' challenge for him to assert as he did, that some of the names in the Petition were 'brought' by the son to **Nduta**, one Njogu. No explanation was given for the failure by those disputed beneficiaries who are allegedly still alive; and the children/spouses of those deceased i.e **Ngamate Macharia** (1<sup>st</sup> house) and **Muguima Mwangi** (1<sup>st</sup> house); **Mwangi Macharia** (2<sup>nd</sup> house), **Patrick Macharia** (2<sup>nd</sup> house) to give evidence at the trial.

18. There was no firm proof that the alleged dead beneficiaries existed or when they died. As for those allegedly living, they neither presented themselves to court nor gave proof of their existence. More critically, there is no proof that any of the disputed beneficiaries whether living or dead, were children of the deceased.

19. This is what the trial court stated in part in its judgment:

**“None of the parties have produced in court documentary evidence to prove actual relationship to the deceased, however, I am swayed by the narration of the Petitioner that he would prefer that all his brothers and sisters dead or alive should be considered beneficiaries of the estate for purposes of this succession. His explanation that the list of names presented to the chief were done by himself on behalf of the second house and Njogu Kamoi (son of his late brother of the second house and Njogu Kamoi (son of his later brother Kamoi Macharia and Nduta Macharia) for the first house. This portion of the evidence is left unchallenged. The chief's letter has the same list of beneficiaries and I am bound to believe it.**

**In the circumstances I am convinced on a balance of probabilities that the Petitioner is genuine as son of the deceased who bears interest of all his brothers and sisters and I proceed to do order that the deceased estate be distributed equally as follows to the beneficiaries:-**

- 1. Kamoi Macharia (deceased) survived by Nduta Kamau Macharia;**
- 2. Keraiko Kamau (deceased) survived by Rachel Njoki Kamau;**

3. Muguima Mwangi (deceased) represented by his son Ngige Muguima;

4. Ngamate Macharia;

5. Mwangi Macharia (deceased);

6. Kamau Macharia;

7. Peter Njoroge Macharia;

8. Virginia Wamuhu Macharia

9. Patrick Kariuki Macharia

**Njogu Wairimu as grandson shall not at this stage be considered a beneficiary since his father’s portion has been catered for through his mother, Nduta Kamoi”**

20. With respect, the correct position in this matter was that as between the Protestors and the Petitioner there was no dispute that they were proper beneficiaries to the estate, by virtue of their admitted standing as widows to sons of the deceased (Protestors) and son to deceased (Petitioner). The list of names in the chief’s letter was the source of contention and in light of the Protest, became at best hearsay evidence of the identities of the disputed beneficiaries.

21. The burden of proving these beneficiaries lay with the Petitioner who had included them and insisted in the proceedings that these disputed persons were beneficiaries to the estate. The claim by the Petitioner, that the list of beneficiaries was jointly prepared by himself and Nduta’s son, was not so much of an explanation as an indirect admission by the Petitioner that he could not vouch for the veracity of the entire list of beneficiaries, while maintaining that all were entitled to benefit from the estate.

22. The proviso to Section 71 of the Law of Succession Act states as follows:

**“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”**

23. Reviewing the evidence on record, I would agree with the Appellants’ complaint on this appeal, that there was no cogent evidence placed before the trial court to prove the disputed persons, as persons beneficially entitled. Possibly, the Petitioner padded the list of beneficiaries especially in respect of the 2<sup>nd</sup> house to which he belonged, with a view to justifying distribution between two houses as he proposed.

24. On a proper review of the evidence, it is clear that only the Petitioner and the two Protestors were shown to be rightful beneficiaries to the estate of the deceased. Secondly, the deceased had two wives, namely **Wambui** and **Wanjiru**. While the Petitioner was the son of the later wife and the intestate, the two Protestors were the widows of deceased sons of the intestate’s first wife.

24. The deceased died prior to the enactment of the current Law of Succession Act. Nonetheless in my reading, Section 2(2) of the Act is wide enough to cover proceedings brought after the commencement of the Act. Section 40 of the Law Succession Act provides that:

**(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 estate 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** (emphasis added).

25. In this case, there are two proven beneficiaries from the first house, and one in the second house. In the circumstances, the estate cannot be distributed without regard to the “number of children in each house”. The estate will be distributed as follows. Two thirds of the land parcel **LR NO. CHANIA/KANYONI/508**, is to go to the first house and be shared by the two Protestors equally. The remaining ? is the Petitioner’s share as the sole beneficiary in the second house. In the end result the beneficiaries will receive equal portions.

26. The appeal having succeeded, the judgment of the lower court is set aside and findings therein substituted with findings that the two Protestors namely, **Nduta** and **Rachael** on one hand, and the Petitioner on the other are the only persons beneficially entitled to share in the estate of the deceased and that each of them shall receive ? of the sole asset of the estate, namely, **Chania/Kanyoni/508**.

In light of the nature of the dispute, the parties will bear own costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 30<sup>TH</sup> DAY OF MAY 2019**

.....

**C. MEOLI**

**JUDGE**

**In the presence of:**

Mr. Kavata holding brief for Mr. Njoroge Kugwa for Appellant

Respondents – present in person

Court Assistants – Nancy/Kevin