



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 14 OF 2013

MONICA WANGARI MUGO.....APPELLANT

VERSUS

JASON NYAGA.....1ST RESPONDENT

JANE MUTHONI NGOROI.....2ND RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the judgement and decree of the Honourable Senior Resident Magistrate Runyenjes Succession No. 84 of 2012 delivered on 27th February 2013.
2. The judgment was in regard to the respondents' protest against the appellant's application for confirmation of grant which excluded them as beneficiaries. The trial court entered judgment in favour of the respondents.
3. The appellant being dissatisfied with the decision of the trial court filed this appeal on 21st March 2013 which on seven (7) grounds that can be summarised as follows: -

1) That the learned Senior Resident Magistrate erred in law and in fact and serious misdirected himself when he failed to appreciate and consider the fact that the deceased had left an oral will that shared his estate prior to his death and what was remaining was for the court to formalize the shares the beneficiaries to get.

2) That the learned Senior Resident Magistrate erred in law and in fact and serious misdirected himself when he failed to appreciate and consider the fact that the respondents are not beneficiaries of the deceased as the 2nd respondent has her own parcel of land as she married while 1st respondent was not a son of the deceased as his father he had been disowned by the deceased vide H.C.C.C. No. 74 of 1978 (NYERI).

3) That the learned Senior Resident Magistrate erred in law and in fact and serious misdirected himself when he failed to appreciate and consider the fact that land parcel No. GATURI/NEMBURE/877 was left and earmarked for appellant and grandsons of the deceased as such the respondents were not entitled to any share thereof.

4) That the learned Senior Resident Magistrate erred in law and in fact and serious misdirected himself when he failed to consider the evidence adduced, circumstances and the nature of the cause when making his ruling

B. Appellant's Submissions

4. It is the appellant's submission that the respondents never proved their relationship to the deceased to the standards required. The appellant who was represented by a counsel further submitted that the appellant being the widow of the deceased was entitled to a much bigger share out of the deceased's estate. However, the counsel did not cite the law he was relying on in this regard.
5. The appellant further submitted the trial court adopted the mode of distribution as suggested by the respondents without giving any good reason for the same and further that the court ought to take into consideration the fact that some of the beneficiaries are married daughters who ought to get a lesser share of the suit land.

6. The appellant further submits that the mode of distribution as adopted by the trial court excludes some of the beneficiaries like one Dennis Munene Njeru who used to stay with the deceased.

C. Respondent's Case

7. It is the respondents' submission that they were entitled to benefit out of the deceased's estate on account of the fact that the 1st respondent was a child of one Ephraim Kahingo a son of the deceased. The appellant admits that the 1st respondent was accepted as the son of the deceased whereas the 2nd respondent was Ephraim's widow.

8. The respondents' further submitted that the 2nd respondent had already been given 0.40 Ha by the deceased as was witnessed by the elders and thus the remaining part of the land was what was to be distributed equally amongst the deceased's beneficiaries.

D. Analysis & Determination

9. The issues for determination are identified as follows: -

- a) Whether the respondents are beneficiaries of the deceased's estate.*
- b) Whether the distribution to the beneficiaries was in accordance with the law.*
- c) Whether there was a valid will of the deceased.*

10. This being a first appeal, the court should analyze and re-assess the evidence on record and reach its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. In the cases of **Selle vs. Associated Motor Boat Co. [1968] EA 123 and Kiruga vs. Kiruga & Another [1988] KLR 348** the court emphasised on the duty of the first appellate court as I have stated herein.

11. The appellant herein listed the deceased's beneficiaries as below and proposed the distribution of the deceased's only asset **LR, Gaturi/Nembure/877**, as follows;

- a) Monica Wangari Mugo – 0.62 Ha*
- b) Agnes Wangari Mugo – 0.10 Ha*
- c) Bancy Wairimu Mugo – 0.10 Ha*
- d) Purity Igandu Mugo – 0.10 Ha*
- e) Margret Wambui Mugo – 0.10 Ha*
- f) Benson Gitonga Njagi – 0.10 Ha*
- g) Dennis Munene Njeru – 0.40 Ha*

12. The respondents filed their affidavit of protest sworn on the 15/11/2012 and proposed the mode of distribution as follows;

- a) Monica Wangari Mugo – 0.23 Ha*
- b) Agnes Wangeci Mugo – 0.23 Ha*
- c) Bancy Wairimu Mugo – 0.23 Ha*
- d) Purity Igandu Mugo – 0.23 Ha*
- e) Jason Nyaga – 0.23Ha*
- f) Jane Muthoni Ngoroi – 0.40 Ha*
- g) Margret Wambui Mugo – 0.23 Ha*

13. From the evidence on record, it is clear that the late Ephraim Kahingo was the son of the appellant born out of wedlock. When the appellant and the deceased got married, the deceased took Ephraim to be one of his sons. The appellant admitted this fact in her testimony before the magistrate. This further emerged from the testimony of PW2, a daughter of the appellant, who testified that Ephraim was one of her brothers. PW4, a brother to the deceased also acknowledged that Ephraim was a son of the deceased. The 1st respondent is one of five children of the deceased Ephraim Kahingo.

14. The **Law of Succession Act** defines a child in **Section 3(2)** as follows: -

References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

15. The appellant submitted that the adoption by the trial court of the mode of distribution proposed by the respondent was wrong as it left out one Dennis Munene Njeru is a son of one Margret Wambui Mugo a daughter of the deceased. A grandchild is not a direct heir of the deceased. Grandchildren are not entitled to inherit from their grandparents so long as their own parents are alive and taking a share in the estate. The mother of Dennis is alive and named as a beneficiary.

16. Secondly, he is not a dependant of the estate and did not apply for provision under **Section 26** of the Act. It is also noted that there is no court order declaring him a dependant of the deceased. Under **Section 29** of the Act, a grandchild can be a dependent of his grandparent, but for him to qualify as such he must demonstrate to the court in an application properly brought under **Section 26** of the Act that he was dependent on the grandparent immediately before his death.

17. It is my considered opinion that magistrate was correct to find that Dennis Munene was not an heir to the estate of the deceased.

18. The 2nd respondent was married to Patrick Njagi Mugo a son of the deceased who passed on. He is survived by Jane and two children Karimi and Benson Gitonga. This fact was not in dispute before the lower court. The allegation that she has remarried was not proved.

19. The appellant testified that Patrick Njagi Mugo had been given one (1) acre of land by the deceased which she proposed be given to one Benson Gitonga Njagi as per the wishes of the deceased. She had proposed that the remaining portion of 0.40 ha. should go to her grandson Dennis Munene according to the deceased's wishes.

20. It must be appreciated that the law does not recognise Benson Gitonga as an heir of the deceased's estate. His mother Jane Muthoni Ngoroi who is an heir in place of her late husband has already claimed her share.

21. I do note that the following are identified as beneficiaries of the deceased's estate: -

- a) **Monica Wangari Mugo** - widow
- b) **Jason Nyaga** - grandson
- c) **Jane Muthoni Ngoroi** - daughter-in-law
- d) **Agnes Wangeci Mugo** - daughter
- e) **Bancy Wairimu Mugo** - daughter
- f) **Purity Igandu Mugo** - daughter
- f) **Margret Wambui Mugo** - daughter

22. The appellant submitted that the court ought to take into consideration the fact that some of the beneficiaries are married daughters who ought to get lesser shares of the estate. The fact of marriage *per se* for both sons and daughters does not change the capacity of the heirs as described under the law.

23. With regard to inheritance of the parents' property, I wish to refer to what was expressed by Kimaru J in the case of **PETER KARUMBI KEINGATI & 4 OTHERS VS. DR. ANN NYOKABI NGUTHI & 3 OTHERS (2014) EKLR**. His Lordship put it this way;

In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. ...This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which has a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow on our legal system despite numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.

24. Consequently, it is my considered opinion that the deceased's daughters are entitled to equal shares of the estate based on the provisions of Section 40 of the Act.

25. The appellant claimed that the wishes of the deceased was to give land to his grandchildren but this was not supported by any evidence. This case was filed by the petitioner herself as an intestacy with no mention of any valid written or oral will that existed at the time of filing this succession cause. Had there been any will, the appellant would have filed a testate succession. The deceased died intestate in this cause which is supported by the record.

26. The deceased was survived by one widow, the appellant and several children. The law applicable in this cause is **Section 40 of the Law of Succession Act** which provides: -

(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.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

27. The children of the deceased have been identified as follows: -

a) Patrick Njagi Mugo – deceased

b) Margaret Wambui Mugo

c) Bancy Wairimu Mugo

d) Purity Igandu Mugo

e) Mwangi Mugo – deceased

28. It was not explained in the evidence before the magistrate whether Mwangi Mugo was survived by any widow or children. There was no share allocated in respect of the late Mwangi by the Magistrate confirming that he had no survivors.

29. The law provides that the widow of the deceased be treated as an additional unit to the surviving children and to the grandchildren taking shares of their deceased spouses.

30. Taking all the above into consideration, I hereby set aside the judgment of the trial court and re-distribute the estate of the deceased between the beneficiaries as follows: -`

a) Monica Wangari Mugo – 0.12Ha

b) Jason Nyaga – 0.12Ha jointly with Charity Wanjiru, Caroline Waithera and Grace Muthoni

c) Jane Muthoni Ngoroi – 0.10Ha for herself and to hold in trust for Benson Gitonga Njagi and Karimi Margret

d) Agnes Wangeci Mugo – 0.12Ha

e) Bancy Wairimu Mugo – 0.12Ha

f) Purity Igandu Mugo – 0.12Ha

g) Margret Wambui Mugo – 0.12Ha

31. The appeal is only partly successful.

32. An amended certificate to issue in the foregoing terms.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Andande for respondent

Respondents present in person