REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO.115 OF 2013

(FORMERLY EMBU APPEAL NO.46 OF 2007 OF PRINCIPAL

MAGISTRATE'S COURT AT KERUGOYA BEFORE S.N. MBUNGI – P.M)

PHYLLIS KARIUKO NJAGI.....APPELLANT

VERSUS

JANE WAGUAMA NJAGI.....1ST RESPONDENT

JANET WAMARWA NJAGI.....2ND RESPONDENT

JUDGEMENT

1. This appeal arises from the Judgement and the subsequent confirmation of grant of Letters of Administration by the Principal Magistrate at Kerugoya in succession Cause No.46 of 2007. The appellants JANE WAGUAMA NJAGI filed a Memorandum of Appeal raising the following grounds;

1. That the Learned Principal Magistrate erred in facts by holding that the 2nd Petitioner was the 1st wife of the deceased when she was the third wife.

2. That the Learned Principal Magistrate erred in law and fact by not properly directing his mind that L.R. No.KABARE/MUTIGE/203 and 192 were registered in the names of KAGONDU NJAGI and DAVID KIURA NJAGI respectively the former land be 1st registration on the 24th day of July 1958 long before the 1st Respondent was married to the deceased.

3. That the learned Principal Magistrate erred in law and fact by holding that L.R. No.KABARE/MUTIGE/203 was registered in the name of JANE WAGUAMA the appellant herein and KAGONDU NJAGI which holding was not supported by documentary evidence.

4. That the Learned Principal Magistrate erred in

law and fact by holding that L.R. NO. KABARE/MUTIGE/192 was registered in the name of DAVID KIURA in trust of his mothers family a holding that was not supported by documentary evidence even as a search certificate was produced as exhibit.

5. That the Learned Principal Magistrate erred in law and fact by holding that the deceased had given 5 acres to the Appellant and the 2nd Respondent herein when no documentary evidence was produced.

5(a) That the Learned Magistrate erred in law and in fact by dealing with L.R. NO.KABARE/MUTIGE/203 which is not part of the estate of the deceased and which property was registered as 1st registration in the names of KAGONDU NJAGI whereas the only property of the deceased was L.R. NO. KABARE/MUTIGE/282.

5 (b) That the Learned Magistrate erred in law and fact by considering L.R. NO. KABARE/MUTIGE/192 as part of the deceased estate whereas the same is registered in the name of DAVID KIURA.

6. That the learned Principal Magistrate erred in law and fact by considering an exhibit produced before him of KERUGOYA CIVIL CASE NO.108/1989 which matter was decided on 13th day of August, 1993 and was dismissed with costs to the defendant which pleadings are time barred in virtue of limitation of actions act as it is over 17 years since it was decided.

7. That the Learned Principal Magistrate erred in law and fact by not recording the details of mutation form dated 8.9.2004 though presented to him by the Appellant herein as an exhibit which shows clearly the last will of the deceased. Moreover the deceased had sub divided his land parcel NO.KABARE/MUTIGE/282 and the resultant Nos. were 3670, 3671, 3672, 3674, 3675, 3676 AND 3677 and that the deceased allocated the resultant Nos. to the following NJAGI KAGONDU, DICKSON KOBUTHI, STEPHEN MURIITHI, GRACE NGONYO, NANCY WANGU, FRANCIS MURIITHI and ALEXANDER NDAMBIRI respectively with portions the said beneficiaries occupy and utilize todate. Only that the deceased died while in the process of executing the transfer of the said portions to the beneficiaries as gift.

8. That the Principal Magistrate erred in law and fact by holding that the deceased had decided to give his three wives 5 acres contrary to evidence from Kerugoya civil case NO.108/1989 which was produced as exhibit by the 1st respondent witness FRANCIS MUREITHI NJAGI.

9. That the Learned Principal Magistrate erred in law and fact by holding that the deceased had shown through an oath that he intended to give the 1st respondent herein 5 acres as he had given the Petitioner when it took him over 13 years until his death having not shown any sign and or attempt to fulfill that but on the contrary sub divided his estate into eight equal portions as it is demonstrated by the mutation form dated 8th of September, 2004.

10. That the learned Principal Magistrate erred in law and fact by holding that the only deceased land available for sharing was 7.6 acres contrary to the evidence adduced orally and documentary

11. That the learned Principal Magistrate erred in law and fact by holding that there was no evidence given that 5 acres given to KAGONDU NJAGI were from the clan when infact the official search of L.R. NO.KABARE/MUTIGE/203 was produced as an exhibit but he court failed and/or refused to record for unknown reasons.

12. That the learned Principal Magistrate erred in law and fact by holding that the deceased in KERUGOYA CIVIL CASE NO.108/1989 gave evidence that he was the one who gave the said KAGONDU NJAGI 5 acres when no documentary evidence was produced to support that claim neither did KAGONDU NJAGI as the registered proprietor of L.R. KABARE/MUTIGE/203 give evidence.

13. That the learned Principal Magistrate erred in law and fact by holding that 1st Petitioner and Objector caused proceeding before Tribunal to have the lands given to them by the deceased registered in their names while the said pieces of land were registered in the name of KAGONDU NJAGI and DAVID KIURA NJAGI as the absolute proprietor.

14. That the learned Principal Magistrate erred in law and fact by holding that the deceased had given the 2nd Petitioner 5 acres when there was no tangible evidence produced.

15. That the learned Principal Magistrate erred in law in awarding the 1st Respondent unduly huge share of the estate to the detriment of the other beneficiaries and against the will of the deceased.

16. That the learned Principal Magistrate erred in law in failing to distribute the estate of the deceased in a manner proposed by the Appellant as it was the last will of the deceased as the Appellant was the one who was taking care of the deceased.

2. It is her prayer that;

· the appeal be allowed.

· the Judgement of the lower court be set aside,

· the grant be revoked

· the issue of distribution be tried before another court.

· In the alternative the court to determine the beneficiaries and their respective shares

· Costs.

BACKGROUND

3. The matter relates to the estate of EVAN NJAGI KAGONDU (deceased) who died on 29.8.2006.

A grant of Letters of Administration was issued to PHILLIS KARIUKO NJAGI and JANE WAGUAMA NJAGI on 15.7.2008. A summons for confirmation of grant was filed by JANET WAMARUA. However, an affidavit of protest was filed by JANE WAGUAMA NJAGI sworn on 15.2.2009. Her contention was that some of the beneficiaries were left out. She lists the following as the survivors of the deceased;

i) JANE WAGUAMA NJAGI - WIDOW

ii) PHYLIS KARIUKI NJAGI - WIDOW

iii) JANET WAMARWA NJAGI - WIDOW

iv) KAGONDU NJAGI - SON

v) NANCY WANGU NJAGI - UN-MARRIED DAUGHTER

vi) MARY MUTHONI - MARRIED DAUGHTER

vii) ALEXANDER NDAMBIRI NJAGI - SON

viii) JOSEPH MWANGI NJAGI - SON

ix) GRACE NGONYO NJAGI - UN-MARRIED DAUGHTER

x) FAITH WANJA - MARRIED DAUGHTER

xi) STEPHEN MURIITHI NJAGI – SON

xii) DAVID KIURA NJAGI - SON

xiii) EUNICE WAMBUI - MARRIED DAUGHTER

xiv) PATRICK CHOMBA NJAGI - SON

xv) WILSON KARINGA NJAGI - SON

xvi) ROSALYD NGONYO - MARRIED DAUGHTER

xvii) CHARLES MWENDIA NJAGI – SON

xviii) AGNES WANGU - MARRIED DAUGHTER

xix) FRANCIS MUTHIKE NJAGI - SON

xx) DICKSON KOBUTHI NJAGI - SON

xxi) SUSAN KARIMI - MARRIED DAUGHTER

xxii) ROSE NGONYO -MARRIED DAUGHTER

She deponed that the deceased left land parcel NO.KABARE/MUTIGE/ 283 comprising 12.6 acres and Plot No.15 GATUGURA MARKET. She proposed the mode of distribution as follows;

a) JANE WAGUAMA NJAGI - to get 2.375 acres

b) ALEXANDER NDAMBIRI NJAGI – to get 1.525 acres

c) NANCY WANGU NJAGI - to get 1.525 acres

d) JOSEPH MWANGI NJOGU – to get 1.525 acres

e) GRACE NGONYO NJAGI – to get 1.525 acres

f) STEPHEN MURIITHI NJAGI –to get 1.525 acres

g) JANET WAMARWA NJAGI – to get 1.525 acres

h) DICKSON KOBUTHI NJAGI- to get 1.525 acres.

The plot No.15 GATUGURA be registered in the name of JANE WAGUAMA NJAGI.

4. JANET WAMARWA NJAGI had proposed the distribution of the estate as follows;

a) JANET WAMARWA NJAGI 7.6 acres

b) JANE WAGUAMA NJAGI 2 ½ acres

c) PHILLIS KARIUKO NJAGI 2 ½ acres out of land parcel No.KABARE/MUTIGE/283.

d) PLOT NO.15 GATUGURA be shared equally among JANET WAMARWA NJAGI, JANE WAGUAMA NJAGI and PHILIS KARIUKO NJAGI.

She had listed the following as the beneficiaries;

a) JANE WAGUAMA NJAGI

b) ALEXANDER NDAMBIRI NJAGI

c) NANCY WANGU NJAGI

d) JOSEPH MWANGI NJOGU

e) GRACE NGONYO NJAGI

f) STEPHEN MURIITHI NJAGI

g) JANET WAMARWA NJAGI

h) DICKSON KOBUTHI NJAGI

5. PHYLIS KARIUKO NJAGI also filed an affidavit of protest dated 16.4.2009 and listed the following as the persons who survived the deceased.

i) JANE WAGUAMA NJAGI - to get 0.572 acres

ii) PHYLIS KARIUKI NJAGI - to get 0.572 acres

iii) JANET WAMARWA NJAGI - to get 0.572 acres

iv) KAGONDU NJAGI - to get 0.572 acres

v) NANCY WANGU NJAGI - to get 0.572 acres

vi) MARY MUTHONI - to get 0.572 acres

vii) ALEXANDER NDAMBIRI NJAGI- to get 0.572 acres

viii) JOSEPH MWANGI NJAGI- to get 0.572 acres

ix) GRACE NGONYO NJAGI- to get 0.572 acres

x) FAITH WANJA- to get 0.572 acres

xi) STEPHEN MURIITHI NJAGI- to get 0.572 acres

xii) DAVID KIURA NJAGI - to get 0.572 acres

xiii) EUNICE WAMBUI - to get 0.572 acres

xiv) PATRICK CHOMBA NJAGI - to get 0.572 acres

xv) WILSON KARINGA NJAGI- to get 0.572 acres

xvi) ROSALYD NGONYO - to get 0.572 acres

xvii) CHARLES MWENDIA NJAGI - to get 0.572 acres

xviii) AGNES WANGU - to get 0.572 acres

xix) FRANCIS MUTHIKE NJAGI - to get 0.572 acres

xx) DICKSON KOBUTHI NJAGI - to get 0.572 acres

xxi) SUSAN KARIMI - to get 0.572 acres

xxii) ROSE NGONYO - to get 0.572 acres

Her proposal was that the estate be distributed equally amongst all the beneficiaries.

6. In a judgement dated 28.1.2010 the trial Magistrate ordered that the estate of the deceased comprising 7.6 acres be shared equally

among his children and surviving spouses that is three wives and 19 children. It further ordered that the 2nd Petitioner gets an equal share plus five acres which the deceased had given her during his lifetime but not transferred.

It is against this finding by the trial Magistrate that the appellant has filed this appeal.

7. When the appeal came up for hearing, the parties agreed to dispose it off by way of written submissions. For the appellant submissions were filed by learned Counsel Mr. Igati Mwai who submits that the trial Magistrate misdirected himself to who was the 1st wife and 2nd wife. That;

1st wife is JANE WAGUAMA NJAGI

2nd wife is PHYLIS KARIUKO

3rd wife is JANET WAMARUA NJAGI

That the only property left behind by the deceased was land L.R. KABARE/MUTIGE/283. That the property was supposed to be shared among sixteen beneficiaries in equal shares including the widows who form individual unit. That the trial Magistrate erred by stating that PHYLIS KARIUKO NJAGI was the 1st wife whereas she was the 2nd wife.

8. That the trial Magistrate erred by not considering that land parcels No.KABARE/MUTIGE/203 and 192 were not part of the assets of the deceased and had no interests in the parcels.

9. He further submits that the trial Magistrate erred by holding that the two land parcels KABARE/MUTIGE/203 and 192 were owned by the deceased and were given to the sons to hold in trust. No documentary evidence was tendered to prove trust. That the deceased had sub divided his land into eight portions and allocated them leaving the remaining portion to himself. That the deceased had not transferred any portion to the 1st Respondent. It is further submitted that the trial Magistrate erred by holding that the only land remaining for the deceased was 7.6 acres after deducting five acres which he gave to the 1st Petitioner.

10. He submits that the 12.6 acres should be shared equally among all the beneficiaries or as per the mutation forms.

11. For the 2nd respondent it is submitted that the deceased had three wives who are;

JANE WAGUAMA NJAGI - 1ST WIFE

PHYLIS KARIUKO NJAGI - 2ND WIFE

JANET WAMARWA NJAGI - 3RD WIFE

She submits that she had agreed with the decision of the lower court because the 1st house got 5 acres that is land parcel No.KABARE/MUTIGE/203, 2nd house got land parcel No.KABARE/MUTIGE/192 (5 acres) which was registered in the name of her son DAVID KIURA. That the estate of the deceased comprised of land parcel No.KABARE/MUTIGE/283 which measure 12.6 acres. That it was therefore right for trial Magistrate to give the 3rd house five acres and the remainder to go to the 1st and 2nd house. This would mean the 1st and 2nd house get 7.8 acres each and the 3rd house 7 acres.

12. For the 1st Respondent it was submitted that the trial Magistrate did not error in giving the 1st Respondent five acres out of land parcel No.KABARE/MUTIGE/283. What she is saying is that she is satisfied with the judgement of the trial Magistrate.

I have considered the proceedings and the judgment of the trial Magistrate as well as the submissions. I have also considered the grounds of appeal. The issue in dispute is the distribution of the estate of the deceased.

13. The deceased was polygamous and was survived by his three wives and nineteen children. The administration of the estate is governed

by the Law of Succession Act (to be referred to as the Act) as he died after the enactment of the ***Law of Succession Act. 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 Act at Section 40 makes provision of the distribution of the estate of a deceased person who was polygamous and has left wives and children surviving him.

Section 40 of the Act 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.***

This is the law applicable to the estate of the deceased. The spirit of the Section is that there be equality in distribution of the estate without any form of discrimination amongst the surviving children and wives.

14. The Act also provides when distributing the estate previous gifts or settlement which were made by the deceased to any beneficiaries is taken into consideration when distributing the estate. Section 42 of the Act makes provision for consideration of previous benefits. 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.***

15. The question is whether the deceased had distributed some land to some of the beneficiaries during his lifetime. The trial Magistrate stated in his judgement at page 41 from line 11 to 20.

> ***"having evaluated the evidence of all witnesses, I do find that the deceased available land for sharing is 7.6 acres that is after removing 5 acres which shall to go the second petitioner.***
>
> ***Secondly there is no evidence that the KAGONDU NJAGI was given 5 acres by the clan for the deceased in civil Case No.108/1989 said he was the one who gave him the 5 acres. Even there is evidence that the 1st Petitioner and the Objector caused proceedings in the land dispute tribunal to have the land given to them by the deceased registered in their names. The 1st Petitioner, and the Objector attended to the proceedings before both tribunals and also the proceedings in the civil case No.108/1980.***

This was based on the evidence which was tendered by the second Petitioner that she should first get five acres as the other houses had been given five acres each. The trial Magistrate based his finding on the law. Though the law was not stated, he stated that;

> ***"the law is clear that where a deceased had several wives or houses the estate is usually shared equally among the children of the deceased with the surviving wives treated as unit" page 41 line 24 to 26.***

In the end he ruled that the 2nd house shall get five acres and the balance of the estate 7.6 acres be shared by the wives and children equally.

The decision of the trial Magistrate was based on the facts and the law and he properly applied the law to the facts presented before him.

16. Though the trial Magistrate erred by stating who was the 1st and 2nd wife are, the issue as to who is the 1st and the 2nd wife is not in dispute. The Law allows corrections of errors which are on the face of the record without affecting the substance of the judgement. This is meant to ensure that court order and judgment are not set aside purely on minor errors or omissions which do go to the root of the order or judgement and their correction will not affect the substance of the judgement.

Section 99 of the Civil Procedure Act provides;

> ***"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties".***

17. I will analyse the evidence which was tendered before the trial Magistrate. The 2nd widow PHYLIS KARIOKO NJAGI though she had proposed a mode of distribution which I have listed above, when she was cross examined she testified that the deceased owned 28 acres out of which he sold a portion. A portion of 5 acres was given to her son DAVID KIURA NJAGI who was to hold it in trust on behalf of other

members of the family. She had sued DAVID KIURA in the tribunal. The land was parcel No.192. The land dispute tribunal ruled in her favour. She further stated that she had sued the deceased in Civil case No.109/99 in Kerugoya Court. The deceased said that the house of JANE WAGUAMA be given 5 acres so that each house gets five acres. In her submissions she has agreed with the mode of distribution ordered by the trail Magistrate as it considered that the third house was not given any land during the lifetime of the deceased.

18. During the proceedings JANE WAGUANA NJAGI testified that her son KAGONDU who is her elder son was given five acres. During cross examination she stated that he had sued her son DAVID KIURA in the land disputes tribunal saying that her son held the land in trust for her family. Though she said the sons of 3rd wife were given 3 acres each, she did not tender any evidence to prove that on a balance of probability.

19. The evidence shows that the deceased had given the houses of the 1st and 2nd wives fire acres each during his lifetime which was registered in the names of the 1st born sons. This was in line with Kikuyu customary laws which registered 1st born sons to hold the land in trust for the family as women were not allowed to own land and could not therefore be registered as proprietors of land. This created customary trusts which have been recognized in the retired **Registered Land Act (Cap.300)** and now under **Land Registration Act No.3/2012** as overriding interests on those titles. **Section 28 of the Land Registration Act** provides;

Overriding interests.

"Unless the contrary is expressed in the register all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without being noted in the register;

(b). trusts including customary trust"

Therefore where a son was registered as a sole proprietor the interests of the members of the family are recognized even where the title does not state that he is registered in trust. He holds the land in trust for himself and other members of the family. Though registered as absolute proprietor, such registration is subject to any overriding interests that may arise though not noted on the register.

20. The 2nd wife PHYLLIS KARIUKO NJAGI and the appellant JANE WAGUAMA NJAGI had sued their sons in the tribunal claiming that they were registered in trust. PHYLLIS produced the search for the land as exhibits 3 – showing that the land was registered in the name of her son. She also produced proceedings in SRM CC 108/1989 which show that the son of JANE WAGUAMA was given 5 acres by the clan where he was living with the family. There were also minutes of the Land Control Board showing that the appellant and her son attended land Control Board to transfer land to her mother.

21. What emerges from this evidence is that the 1st and 2nd house had each received five acres during the lifetime of the deceased. In line with **Section 42 of the Act** which I have quoted above such settlements must be taken into consideration during the distribution of the estate. I find that the trial Magistrate properly addressed his mind to the facts and the law. He took into consideration the fact that the 3rd house had not received anything during the lifetime and gave her a bigger portion before distributing the remaining estate. This ensured equal distribution of the estate to the beneficiaries in line with the spirit of the Act which ensures equality and none discrimination. The error on who was the first wife which the trial Magistrate made is matter which can be corrected as provided under Section 99 of the Civil Procedure Act which I have quoted above. The wives of deceased are;

JANE WAGUANA NJAGI – 1ST

PHYLLIS KARIUKO NJAGI - 2ND

JANET WAMARWA NJAGI - 3RD

The proceedings in the lower court had reflected the 2nd Petitioner as JANET WAMARWA NJAGI so where the judgment of the trial Magistrate stated that the 2nd Petitioner gets five acres it refers to JANET WAMARWA NJAGI.

22. There was no evidence tendered by the appellant before the trial court that deceased had sub divided his land into eight portions and allocated them. The trial had no reason to make a finding on that as it was not in issue before him.

IN CONCLUSION

23. The trial Magistrate considered the evidence tendered before him and the law and properly came to the conclusion that the 3rd house was entitled to five acres out of the estate of the deceased to be at per with the other two houses then distributed the remaining portion in accordance with ***Section 40 of the Law of Succession Act.***

I therefore have no reason to interfere with the judgement of the trial Magistrate. I find no reason to annul or revoke the grant.

I find that the appeal lacks merits and is dismissed.

Since the matter involves members of the same family, I will not make any orders as to costs. Each party will bear it's own costs.

DATED AT KERUGOYA THIS 19TH DAY OF DECEMBER, 2019.

L. W. GITARI

JUDGE