REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 36 OF 2015

IN THE MATTER OF THE ESTATE OF DANIEL NDUATI (DECEASED)

(Being an appeal from the Judgment of the Honorable Resident Magistrate Hon. A.N. Ogonda delivered on 20th December 2013 in Succession Cause No. 49 of 2011 – Thika in the Estate of Daniel Nduati (deceased)

MUTURI NDUATI.....APPELLANT

VERSUS

BENJAMIN MACHARIA NDUATI……...1ST RESPONDENT

MUTHONI MUTURI……..……2ND RESPONDENT

JUDGMENT

1. The appellant Isaac Muturi Nduati was aggrieved by the confirmation of grant contained in the certificate issued on 20th December 2012 by the learned Resident Magistrate at Thika in Succession Cause No. 49 of 2011 and filed this appeal on 11th October 2013 complaining as follows:-

a. the leaned magistrate erred in law and in fact in failing to make a finding as to whether the deceased had two wives and/or houses;

b. the learned magistrate misdirected herself in law in making orders that disinherited the appellant;

c. the learned magistrate erred in law in making orders that did not entirely fully distribute the deceased's person's estate according to the two houses;

d. the learned magistrate erred in law and in fact in failing to acknowledge that the deceased had a polygamous family;

e. the learned magistrate erred in law and in fact in giving the judgment that he gave; and

f. the learned magistrate erred in law and in fact in failing to evaluate the entire evidence on record.

He sought that the appeal be allowed with costs and the judgment of the lower court be overturned. The

appeal was filed through Kibathi & Co. Advocates.

2. The respondents Benjamin Macharia Nduati and Muthoni Muturi opposed the appeal through Muturi Njoroge & Co. Advocates.

3. The parties agreed to file written submissions which was done. I have considered the submissions.

4. The power of the first appellate is to review the evidence tendered before the trial court to determine whether the conclusions of the court should stand **(Peters –v- Sunday Post Limited [1958]EA 424).** The jurisdiction is exercised with caution. If there was no evidence to support a particular conclusion, or it is shown that the trial court failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.

5. This was a straightforward cause where on 28th January 2011 the 1st respondent and the appellant jointly petitioned the lower court for the grant of letters of administration intestate in respect of the estate of their late father Daniel Nduati who had died on 24th November 2010. They swore a joint affidavit in support of the petition in which they stated that the deceased had three beneficiaries: the two of them (being sons) and Muthoni Muturi (the 2nd respondent) whom they said was the deceased's daughter-in-law. On 9th May 2012 a joint grant was issued to them. On 18th September 2012 they filed an application for the confirmation of the grant, and swore a joint affidavit in support. In paragraph 2 of the affidavit they swore that the two and the 2nd respondent were the only surviving dependants of the deceased. In paragraph 7 they indicated that the estate of the deceased comprised land parcel Loc.1/Kiriani/181. They proposed to have the parcel shared equally among the three. The certificate of official search filed with the petition had indicated that the land measured about 4.1 acres. On 28th November 2012 the grant was confirmed, and certificate issued on 20th November 2012.

6. There is on record a letter dated 22nd November 2010 by the Chief Kiriani Location which was filed by the appellant and the 1st respondent when petitioning for the grant of letters of administration intestate. It stated that the three beneficiaries were the only ones that the deceased had left.

7. In the memorandum of appeal the appellant now states that the deceased had two wives, and therefore left two houses. In the written submissions filed by his counsel the particulars of the two houses are given. It is his case that he expected the estate to be shared in accordance with the houses. In which case, each house would get equal share. In short, evidence cannot be introduced through the memorandum of appeal or the written submissions. The appellant was bound by the contents of the affidavits he swore to support the petition and the application of the grant. A party is bound by his pleadings and evidence given on oath. In the written submissions it is stated as follows:-

> **"the 1st respondent was the one pushing to have the grant confirmed and that he intimated to the appellant that the deceased property would be distributed in respect of the two (2) houses……"**

and

> **"in as much as the supporting affidavit dated 18th September 2012 in support of the application for confirmation of Grant. The appellant being a person of limited knowledge "faithfully" appended his signature by writing his name on the document all this time hoping that the deceased property would be divided in respect of the two (2) houses ……"**

As I have indicated in the foregoing, the appellant cannot seek to introduce evidence through written submissions. The lower court was not informed that the appellant suffered from any incapacity, or that there was some other arrangement between appellant and the 1st respondent beyond the affidavits that they had sworn.

8. In total, I agree with the respondents that the appellant fully participated in the petition and application for confirmation, and that the distribution of the estate of the deceased followed a proposal to which he was a party.

9. The result is that, the appeal filed on 11th October 213 by the appellant to challenge the certificate of confirmation and distribution of the estate of the deceased lacks merits and is dismissed with costs.

SIGNED and DATED at NAIROBI this 25th JANUARY 2017

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 26th JANUARY 2017

M. MUIGAI

JUDGE