



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 33 OF 2016**

**MWANGI NGOTHO.....APPELLANT**

**VERSUS**

**JANE WANGARI NYAMU.....RESPONDENT**

**JUDGMENT**

1. The Deceased herein had four children: Mwangi Ngotho; James Nyamu; Ruth Wangui Mbugua and Mary Murugi Kamau. He died in 1992. His son, James Nyamu has also died but he left a wife, Jane Wangari Mbugua.
2. Upon the Deceased's estate, Mwangi Ngotho – his son – and Jane Wangai Mbugua – the daughter-in-law (wife to the son who had died) filed for letters of administration. In all the forms and affidavits they filed, the co-administrators declared that the Deceased had died intestate.
3. In the affidavit in support of Petition for Letters of Administration Intestate, which the two co-Administrators co-signed, they named four beneficiaries as surviving the Deceased:
  - a. Mwangi Ngotho – described as a son
  - b. Jane Wangari Nyamu – described as a daughter-in-law
  - c. Ruth Wangui Mbugua – described as a ?married? daughter
  - d. Mary Murigi Kamau – described as an ?unmarried? daughter
4. Both Ruth Wangui Mbugua and Mary Murigi Kamau signed a Consent to the Making of a Grant of Administration Intestate to a Person of Equal or Lesser Priority which was filed together with the Joint Petition by Mwangi Ngotho and Ruth Wangari Nyamu.
5. It would seem the family was of the same mind – until time for confirmation came.
6. Ruth denounced her share. But she supports Mary in getting a share. She denies that their father ever made any distribution of the estate as claimed by Mwangi Ngotho. So does Jane.
7. In the lower court, Jane Wangari Nyamu gave straightforward testimony denying that the Deceased had sub-divided the land before his death and attesting that Mary Murigi Kamau was occupying the piece she occupies now even before the Deceased passed on. She proposed that the land should be divided into three equal portions.

8. Ruth Wangui Mbugua denounced her share and so testified under oath. She also testified that the property should be subdivided into three parcels – one each for Ngotho Kariuki; Jane Wangari Nyamu and Mary Murigi Kamau. She was not sure if the subdivision should be equal; she was only sure that each of the three should get an equal share. She was categorical, however, that the Deceased, their father, had not subdivided the land before he died. She was equally categorical that he died intestate.

9. Mary Mwangi, on her part, was equally categorical in denying that their father had subdivided the land before he died. She testified that she had always lived in the land – even when their father was alive. She wanted the land distributed between Mwangi Ngotho, Jane Wangari and herself. Interestingly, she asked the Court to give her a smaller portion. Presumably, that is the portion she has always been in possession of.

10. For his part, Mwangi Ngotho testified that the Deceased had sub-divided the land before he died. He testified that the Deceased had sub-divided into two: half for him and the other half for his brother (whose interests are represented by Jane Wangari Nyamu). He further testified that the sub-division was done in the presence of many people. He called two people to corroborate his story. Imunyu Njuguna is a brother to Mwangi Ngotho's wife and testified that he was present in 1985 when the Deceased sub-divided the land into two. He claimed that he recalled the Deceased saying that no daughter should be given land. James Nyamu is a nephew to Mwangi Ngotho and similarly testified that the Deceased subdivided the land in 1985 and gave portions only to his two sons leaving out Mary Murugi. On cross-examination, he said that he was 35-years old at the time the subdivision happened and that he is the last born in their family. He further testified that he was not an elder at the time.

11. On this evidence, the Learned Magistrate concluded that there was no evidence that the Deceased had sub- divided his land into two before he died. He also concluded that the Deceased had died intestate. While noting that section 38 of the Law of Succession provides that where an intestate has died leaving no spouse but only children, the estate is to be divided equally among the children, the Court considered that Ruth Wangui Mbugua had denounced her share and Mary Murugi had, in affidavit filed in Court, acquiesced to receiving a smaller share. Consequently, the Court ordered the land to be distributed as follows:

- a. Mwangi Ngotho to get 1.50 acres
- b. Jane Wangari Nyamu to get 1.50 acres
- c. Mary Murugi Kamau to get 0.70 acres.

12. The Appellant was dissatisfied by that decision of the Court. He insists on appeal that the land should have been divided into two with Mary Murugi Kamau getting on shares whatsoever. He insists that the Deceased had sub-divided the land and that it was misdirection for the Learned Magistrate to find otherwise. His lawyer, Mr. Kamonjo faulted the magistrate for insisting on ?tangible? evidence to prove that the sub-division had happened.

13. Further, Mr. Kamonjo argued that it was an error for the Learned Magistrate not to conclude that the Deceased had left an oral will. The terms of the oral will, Mr. Kamonjo claimed, were that the land would be divided into two only but that Mary Murugi Kamau, because she was not married and was childless, would get a life interest over the portion she was in possession was. Mr. Kamonjo insisted that there is no requirement to produce anything physical to prove an oral will. Even though Mwangi Ngotho did not call it an oral will at the lower court, Mr. Kamonjo argued that the evidence adduced showed that it was and the Learned Magistrate should have so found.

14. On their part, the Respondents opposed the appeal. They insisted that there was no sub-division by the Deceased as claimed. Further the impugned the plausibility of the Appellant's version of events thus:

- a. First, they argue that among the Kikuyus, customarily, an in-law is never called to witness as serious a matter as a father dividing land to his children. Usually, it is the other elders who are

called including the brothers of the person distributing the property who would be called.

b. Second, they argue that it would have been implausible that James Nyamu would have been called by the Deceased as a witness in the sub-division since he was fairly young, a grand-child of the Deceased and not an elder.

15. As I see it, there are two fairly straightforward issues raised by the appeal:

a. First, was the Learned Magistrate in error when she concluded that there was no evidence of distribution during the Deceased's lifetime?

b. Second, was there a valid oral will in this case?

16. After reviewing and re-evaluating the evidence given at the trial as I am obligated to do as a first appellate court (See *Kemfro Africa Ltd T/A "Meru Express Services*

*(1976)" & Another v Lubia & Another [1987] KLR 30*, I am unable to say that the Learned Trial Magistrate erred in concluding that the Appellant had not proven to the requisite standards that the Deceased had distributed his land during his lifetime.

17. It is true that Kikuyu Customary law permitted an elderly man to sub-divide his land during his lifetime. The celebrated case, *Karanja Kariuki vs Kariuki[1983] KLR 209* explicitly held as much. The Court of Appeal held that '*property of a Kikuyu man could be distributed during lifetime to his children, or he could give directions on the administration and distribution of his property shortly before his death.*' The conditions, as Kneller JA stated, however, were quite explicit:

Now, by custom, Kikuyu father has to distribute his land among his sons during his lifetime if possible, and usually does so. This often happens where a son marries and it counts as that son's share if his father has not revoked the gift before he dies....He may make a will in old age or on his death bed and the only formalities required are that he must say before the elders of his family (Mbari) and of the clan (Muhiriga) and close friends who will be administrator (Muramati) of his estate and to whom each item of it shall go....

18. In this case, these formalities have not been proven. First, the evidence led on how and where the distribution took place was extremely sketchy and, in my view, the Learned Trial Magistrate was justified to find that the fact of lifetime distribution had not been proven.

19. Secondly, as the Respondents argue on appeal, for lifetime distribution, the Deceased would have had to call elders of his family (mbari) and of the clan (muhiriga) to announce his will. Here, the only two claimed witnesses were not either elders of the mbari or muhiriga or, in the case of James Nyamu, was not even an elder.

20. I therefore concur with the Learned Trial Magistrate that lifetime distribution was not proved in this case.

21. What about a valid oral will? Did the Deceased make a valid oral will bequeathing the land to his two sons?

22. Section 9 of the Law of Succession Act provides for oral wills. It stipulates that:

(1) No oral will shall be valid unless—

a. it is made before two or more competent witnesses; and

b. the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

23. The provisions of the law are clear that whatever happened in 1985, the Deceased did not author a valid oral will: The alleged oral will was purportedly made in 1985 more than seven years to the date in 1992 when the Deceased died. An oral will can only be valid if it the Testator dies within three months from the date of the making.

24. Having disposed off the only two issues presented by this appeal, it must now stand dismissed. The judgment of the Learned Trial Magistrate dated 01/02/2016 is hereby affirmed. The Appellant shall pay the costs of this appeal.

25. Orders accordingly.

**Dated and delivered at Kiambu this 23rd day of March, 2017.**

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**JOEL NGUGI**

**JUDGE**