REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT CIVIL APPEAL NO. 18 OF 2015

(FORMERLY MERUHIGH COURT CIVIL APPEAL NO 6 OF 2012)

SEBSTIANO MUGO M'REWA…………………………….....APPELLANT

VERSUS

PETER KAUMBUTHU M'REWA……………..……………..…RESPONDENT

JUDGEMENT

1. Vide Certificate of Death B No.506154 M'Rewa Baigweta ("the deceased") is shown to have died on 5th July, 1999 at the age of 99 years. Pursuant thereto,on 26th October, 2006 Patrick Micheni Bundi, the Chief of Karingani Location wrote a letter in which he introduced the following as the ones surviving the deceased:-

a. Jesca Mukwambogo Njagi – widow
b. Sebastian Mugo M'Rewa – son
c. Stanley Nkonge Bita – son
d. M'Riti Nyaga – son
e. Justa Nthiga – daughter
f. Tavacira Mukwairu – daughter

2. Pursuant thereto, on 7th November, 2006, Sebastian Mugo M'Rewa (hereinafter "the Petitioner") petitioned for grant of letters of administration intestate for the estate of the deceased. The grant was issued to him on 12th September, 2007. On 3rd June, 2008, the petitioner applied for confirmation of grant and proposed that, the only asset of the deceased disclosed as being Karingani/Muiru/1032 and measuring 7.35 acres be distributed equally between him, Stanley Nkonge and M'Riti Nyaga. On 6th June, 2008, Peter Kaumbuthu M'Rewa (hereinafter "the Protestor") filed a protest to the distribution.

3. In his protest, the protestor contended that he is one of the sons of the deceased.That the petitioner's proposed distribution will disinherit him; that two other properties namely, Karingani/Mariani Adjudication Section Nos. 3065 and 507 had been excluded in the petitioner's proposed distribution. He therefore proposed that all the three (3) properties be distributed equally between the four (4) sons of the deceased, him included. The protest was ordered heard by way of viva voce evidence.

4. In his testimony, the objector told the court that he was the eldest son of the deceased. That the deceased had two (2) wives, one Ciamburia who had one child Dionisia Njagi. Both Ciamburia and son were deceased. The second wife of the deceased was Jesca Mukwambogo (DW 1) who

had six (6) children, the objector, the petitioner, Justin Thigaa, Tarasila Mukwaino, Stanley Nkonge and Stephen Nyaga. He further testified that the deceased left the three (3) properties that he had set out in his protest. That as far as he was concerned, he was the deceased's biological son; that the issue of his parentage was never raised during the lifetime of the deceased. In cross examination, he stated that he was born in 1939 and lived with his motherand deceased during his early years; that he was married to Jacinta Kaumbuthu (PW2) in 1970 and the deceased's name was indicated as his fatherin his certificate of marriage; that after marrying, he build his house on the deceased's land in 1973 but moved out in 1978 when he was able to build a house on his own land which he had purchased in 1973. That at no time during his lifetime did the deceased deny or disclaim him.

5. Jacinta Karimi Kaumbuthu (PW2) is the wife of the objector. She produced a certified entry of her marriage to the objector dated 5th August, 2008. She was married to him on 2nd February, 1972. She told the court that during their said marriage they lived in the deceased's land cultivated on it and the issue of the protestor's paternity had never risen. On his part M'Nanu M'Mugwiria (PW3) told the court that he was 80 years old and a clan member of the deceased's clan. That he knew the deceased, his two wives and their children. That the protestor was a son of the deceased as the deceased was involved in his circumcision in accordance with the Meru customs and tradition.

6. Jesca Ciakang'ori (DW1) told the court that she was the mother to both the protestor and petitioner. That she was first married to one M'Rithaa who had fathered the Protestor, before being married to the deceased. That he moved to the deceased with the protestor and lived with the deceased. That the protestor did not visit the deceased while in hospital. That the Protestor was not entitled to share in the deceased's land. In cross examination, she admitted that after the protestor married PW2, they used to live together but PW2 used to call her a dog. The petitioner adopted the evidence of his mother (DW1) and told the court that the protestor was not a dependant of the deceased.

7. After considering the evidence, the trial court entered judgment in favour of the protestor and ordered that save for DW1, the widow, all the assets named as belonging to the deceased be distributed equally among the sons of the deceased. The court found that the objector was a son of the deceased and therefore entitled to inherit. The trial court also found that the daughters of the deceased did not wish to be included in the distribution of the estate and therefore excluded them from the same altogether.

8. Aggrieved by the said decision, the Appellant has appealed to this court and set out five (5) grounds which can be summarized as follows:-

    a. that the trial court erred in adjudging the respondent a dependent and including him in the distribution of the estate and thereby disinheriting the daughters of the deceased;

    b. that the trial court failed to evaluate the evidence given by the Appellant; and

    c. that the decision of the trial court is a recipie for chaos as the affected parties were not given an opportunity to present their cases.

9. This being a first appeal, this court is enjoined to review and re-evaluate the facts afresh and draw its own independent conclusions and findings. See Selle - V – Associated Motor Boat Co. Ltd [1968] EA 123. However, in so doing, this court must have in mind that it did not see the witnesses testify.

10. At the hearing of the Appeal, the Appellant submitted that the Respondent is not a son of the deceased; that he only took the national identity card in the name of the deceased; that he was therefore not entitled to share in the estate.That the trial court imposed the Respondent upon the estate of the deceased. The Appellant therefore urged that he and the Respondent be allowed to take the oath under Meru Traditional Customs. Ms. Kaaria Learned Counsel for the Respondent

submitted that there was no error in distribution; that the daughters of the deceased were present at confirmation but they did not stake a claim in the estate; that the Respondent was not a stranger to the estate as the deceased treated him as a son. She further submitted that the trial court properly evaluated the evidence. On the Appellant's proposal that the matter be decided on oath under Meru Culture, Counsel submitted that the same was not necessary. She urged that the Appeal be dismissed. In reply, the Appellant submitted that the Respondent lives in a land that does not belong to the deceased; that the Respondent has never cultivated any land belonging to the deceased and has not named any of his children after the deceased in terms of the Meru Custom. He urged that the Appeal be allowed.

11. This court has carefully considered the record and the submissions of the parties. Before making a determination on the issues that arise from the grounds set out in the Memorandum of Appeal, there is one issue that this court needs to observe from the confirmation of grant issued on 12th January, 2012.The trial court distributed three properties, to wit, L.R. Karingani/Muiru/1032, Karingani/Muriani Adj. Section 507 and 3065, respectively. Whilst L.R No.Karingani/Muiru/1032 is clearly in the name of the deceased M'Rewa Baigweta as per the copy of the land certificate dated 4th April, 1986, there was no searches produced in respect of Karingani/Mariani Adjudication Section 507 and 3065. However, since the parties seem to have been in agreement before the trial court even before this court that the properties belonged to the deceased and no one has complainedthis court will not make any findings about the ownership thereof.

12. The first ground is that the trial court erred in adjudicating that the Respondent was entitled to share in the estate and disinherited the daughters of the deceased. The evidence at the trial was that the deceased was married to two wives, the late Ciamburia whose son Dionisio Njagi is also deceased and Jesca Mukwambogo (DW1). The Respondent testified that he was the eldest son of the deceased with Jesca Mukwambogo (DW1). That his identity card bore the deceased as his father; that when he was married to Karimi PW2 in 1972, the marriage certificate that was issued (PExh 1) showed that the deceased was the Respondent's father. The Respondent testified that the deceased took care of him; that he grew in the home of the deceased who treated him as his own son and that when he was of age he bought his land and moved thereto in 1978. He told the court that the issue of his paternity never arose during the lifetime of the deceased. All this was not effectively challenged.

13. On his part the Appellant adopted his mother's (Jeska Ciakang'ori) evidence who told the court that the father of the Respondent was one M'Rithaa. That M'Rithaa died when the Respondent was as young boy; that the Respondent did not know who his father was; that when she was married by the deceased she moved there with the Respondent. That the deceased took the Respondent to his uncle for circumcision after which he returned to live with them. She told the court that after marriage, the Respondent and his wife used to live with the deceased and DW1 in the same homestead but the Respondent's wife used to call her a dog.

14. From the evidence at the trial, it is not in dispute that the Respondent was a son of Jesca Ciakang'orithe wife of the deceased. She was firm in her testimony that she came to the deceased's marriage with the Respondent as a young boy. She confirmed that the Respondent lived with both her and her husband until he was of age. That even when he married PW2, they continued to live together until later when he had bought his own land. The Respondent himself told the court that he married in 1970, bought his land in 1973 but moved thereto in 1978. There was evidence that when he took his national identity card, the Respondent had the deceased's name indicated as his father. This was the case with his marriage certificate. PW3 M'Nanu M'Mugwiria told the court that he always knew the Respondent to be a son of the deceased; that the Respondent grew up in the home of the deceased and that he was circumcised by the deceased in accordance with Meru Customs.

15. The trial court found that there was no scientific evidence that was produced to show that despite the deceased living with and providing for the Respondent until after he was married; that although he took care of him until he was of age, that the Respondent was not the deceased's son.

In the view of this court, there is nothing that was produced to show that the trial court was wrong in its findings. It should be recalled that at no time did the issue of the parentage or paternity of the Respondent arise during the lifetime of the deceased. It would seem that the deceased himself never rejected the Respondent since the time the Respondent was a child until he married and moved out to live in his own land. Why the mother would team up with the Respondent's younger brothers, after the deceased's demise, in order to deny him inheritance is anybody's guese. She was categorical that the Respondent with his wife lived in the same homestead with the deceased together with her. However, she stated that the Respondent's wife used to call her a dog. That may not have gone down well with her. To this court's opinion, there was nothing to show that he Respondent is not the son of the deceased or that the deceased did not treat him as such during his lifetime. That position cannot be changed after his demise.

16. Even if the Respondent was not the biological son of the deceased, the evidence on record shows that the deceased had taken him as his child. The Respondent grew up at the deceased's home being taken care by him until he was married. Despite marrying in 1970, the Respondent continued to live with and in the deceased's homestead until 1978. He was never driven away. He moved out on his own volition which is expected of any reasonable man who wants to start his own family. Accordingly, the fact that the Respondent bought his own land and moved thereto does not make him a lesser son of the deceased than the petitioner or his other brothers or deny him inheritance. Under section 29 of the Law of Succession Act, a child who is taken as a child of a deceased person is entitled to inheritance. Accordingly, there is no evidence that the trial court wrongly admitted a stranger to the family of the deceased.

17. As regards the allegation that the trial court preferred the Respondent and disinherited the daughters of the deceased, the trial court made a finding that the daughters did not stake a claim in the estate. They had been married and that is why probably they did not make any claim. It is not for the court to force inheritance on a beneficially. The court shares the estate to those beneficiaries who are willing to inherit and who stake a claim for the same. In this case, the daughters of the deceased did not and the trial court cannot be faulted for not including them in the distribution of the estate. In any event, the Appellant himself had not included the said daughters in his own proposed distribution dated 28th May, 2008. He cannot now turn around and accuse the trial court for not including them in the distribution.

18. The next ground was that the trial court failed to evaluate the evidence adduced by the Appellant. In the judgment of the trial court, the court evaluated all the evidence of all the witnesses who testified before it. Indeed the court gave the reasons why it accepted the evidence of the Respondent while rejecting that given by the Appellant and his mother. Having evaluated the evidence of DW1 which evidence the Appellant adopted, it cannot be said that the trial court did not evaluate the Appellant's evidence.

19. As regards the complaint that the trial court's decision is a recipie for chaos and that the affected parties were not given an opportunity to be heard, this court has carefully considered the record. The Appellant has not indicated who were affected by the judgment of the trial court yet they had not been heard. All those who were contesting were given a hearing and the respective parties closed their cases in accordance with the law. It cannot be true that a lawful decision of a court can be a recipie for chaos. The court has determined the dispute in accordance with the law and evidence. If there was any evidence left out, the Appellant has not produced it. In any litigation, it is upon the parties to produce all the relevant evidence and present their respective cases in court so that a dispute is determined in accordance with the law. Once a court of law determines such a dispute, there can be no room for any chaos unless a party propagates the notion that a decision is right only when it is in his/her favour. To my mind, once issued, a decision of a court is lawful and biding on the whole world. In this case, I see nothing to show that the trial court's decision is a recipie for chaos and I reject that allegation.

20. On the Appellant's proposal that the parties be allowed to take an oath under the Meru Customs, I believe that alternative dispute resolution is a mode provided for by our Constitution. However,

the parties must be willing to subject themselves to that mode willingly and not be forced. Apart from the Family and Commercial Divisions of this court in Nairobi which are subject to the court mandated mediation that is regulated by law, I know of no other. In this regard, even after this judgment if the parties are willing they can still subject themselves to the subject oath under the Meru Custom if they so wish. However, one wonders why this is becoming necessary, ten (10) years after the dispute arose.

21. In the circumstances, I find the Appeal to be without merit and the same is dismissed with costs.

DATED and DELIVERED at Chuka this 28th day of April, 2016

A.MABEYA - JUDGE.