



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 33 OF 2015

(FORMERLY MERU HCCA. 68 OF 2010)

SILAS NJERU M'THAARA.....APPELLANT

VERSUS

M'RITHAA THAARA.....RESPONDENT

(An Appeal from the Ruling and conviction of N. N. Murage – RM

made on 23.6.2010 in Chuka Principal Magistrate's Criminal Case

No.68 OF 2010

JUDGMENT

1. The late Jediel M'Thara alias Ileri Kiao (hereafter "the deceased") died on 14th August, 1983 leaving behind the following properties as forming his estate:

1. L.R. Mwimbi/S.Magumango/139-6.5 Acres
2. L.R. Mwimbi/S. Magumango/984 – 0.20 Acres
3. ½ share in plot No. 30 Mwira Market

2. On 16th September, 2008, Silas Njeru M'Thara (hereinafter "the Appellant") petitioned for the administration of the estate of the deceased. In the petition, the Appellant disclosed seven (7) individuals as those surviving the deceased. These were; the appellant, Lucy Ntue, Nkonge Jediel, Plulis Mukwairu, Cecilia Nkiuga, Lucy Mukwanyaga and Veronica Kanyua. The Grant of Letters of Administration Intestate was issued to the Appellant on 18th November, 2008 and on 15th May, 2009, he applied for the said grant to be confirmed. Although he disclosed in paragraph 2 of the Affidavit in support of the summons for confirmation the aforesaid seven (7) survivors of the deceased, in paragraph 5 thereof he proposed that the only two (2) assets that he had disclosed as belonging to the estate, to wit, Mwimbi/S.Magumango/139 and Mwimbi/S. Magumango/984 be distributed to him alone.

3. On getting wind of the petition and confirmation application, M'Rithaa Thaara the Respondent, Festus Riungu M'Thaara and Patrick Katheruya Rubara filed Affidavits of Protest. They contended that they were entitled to share in the estate of the deceased by virtue of being sons (for the Appellant and Festus Riungu M'Thaara) and a nephew of the deceased, respectively. That Patrick Katheruya Rubara was entitled to 1 acre in the estate by virtue of having been given the same by the deceased during his lifetime. After hearing the parties and their witnesses, the trial court (C.N. Ndubi RM) by a ruling delivered on 18.12.2009 held that:-

- a. the Respondent be enjoined as a co-administrator in the Succession Cause;
- b. all the beneficiaries of the estate be properly listed in an amended application for confirmation of grant, and
- c. that such application do include Patrick Kathenya Rubara with his one (1) acre share clearly stated.

4. As regards the beneficiaries, the court made a finding that the appellant and the respondent herein were the only beneficiaries as all the other beneficiaries (married daughters) were not interested in getting a share in the estate. Then on 23rd June, 2010, the trial court (N. N. Murage – RM) distributed the estate as follows:-

- a. M'Rithaa Thaara
 - i. 2 acres in LR Mwimbi/S. Magumango/139
 - ii. 0.20 acres in LR Mwimbi/S. Magumango/984.
 - iii. Plot No. 30 Mwiria Market
- b. Silas Njeru M'Thaara – 3.0 acres in Mwimbi/S. Magumango/139
- c. Patrick Kathenya Rubara – 1.0 acre from LR Mwimbi/S. Magumango/139

A certificate of confirmation to that effect dated 23rd June, 2010 was issued. It is that decision and certificate that the appellant filed this appeal to challenge.

5. In his memorandum of appeal lodged on 9th July, 2010, the appellant contended that the trial court erred in failing to distribute the estate equitably; to consider the submissions of the appellant thereby arriving at a wrong decision and in deciding the whole case against the weight of evidence. The parties filed written submissions in respect of the appeal which their counsels ably hi-lighted. It was submitted on behalf of the appellant that the court erred in adding Duncan Njiru Jediel (a grandson) and Patrick Kathenya Rubara as beneficiaries making it unfair to the real beneficiaries; that the appellant suffered prejudice because the court failed to consider the appellant's submissions, that the decision was against the weight of evidence and that the court allowed the introduction of 3rd parties who were not rightful beneficiaries. Mr Kimathi learned counsel for the appellant reiterated the appellant's written submissions and further submitted that; the court failed to consider that the respondent had already been provided for; that there was evidence that the respondent did not live on the estate land; that the trial court did not have jurisdiction to entertain the matter; that once a protest was filed, the trial court should have referred the matter to the High Court for determination and that the value of the subject matter was in excess of Kenya shillings 100,000/= (one hundred thousand)

6. On the part of the respondent, it was submitted that the trial court having had the advantage of seeing the testimonies of witnesses had held that the respondent was a beneficiary yet he had not been provided for by the appellant; that the appellant had failed to prove that the respondent had been catered for in terms of section 42 of the Law of Succession Act Cap 160 of the laws of Kenya (hereafter "The Act") that the rights of the parties before court ranked in equality in terms of Article 27 (1) of the Constitution of Kenya; that plot number Mwimbi/Mugumango/63 was being introduced at the submission level; that applying the decision of Stephen Gitonga M'Murithi -V- Faith Ngira Murithi Njeri CA NO. 3 of 2015 the distribution by Hon. N. N. Murage was equitable and in accordance with the law. Mrs Ntaragwe learned counsel for the respondent reiterated the respondent's written submissions and further submitted that it was not true that Duncan Njiru Njenje was provided for as submitted for the appellant; that since Patrick Kahenya Rubara was not joined in the appeal, no adverse decision can be made in respect of him. That on jurisdiction, the same had not been raised in the memorandum of appeal; there was no evidence that the estate was over Kenya shillings 100,000/=(one hundred thousand). Counsel concluded that there were no grounds to upset the decision of the trial court and therefore urged that the appeal be dismissed.

7. This court has carefully considered the record all the affidavits and evidence produced before the trial court. The court has also considered the respective parties written submissions as ably hi-lighted by their respective counsels. This being a first appeal, this court's mandate is to re-appraise the evidence and draw

its own independent inferences of facts. The court is however enjoined not to interfere with the trial court's findings of fact unless there is demonstration that such findings were based on no evidence; or they were based on a misapprehension of facts or the trial court is shown to have acted on a wrong principle in reaching its findings.

8. Before delving into the three (3) grounds of appeal put forth by the appellant, I would like to address a few issues that arose in the submissions of learned counsel. Firstly, the appellant submitted that it was wrong to include in the distribution among others, one David Njiru Njenje. I have looked at the certificate of confirmation of grant dated 23rd June, 2010. The same does not show that the said David Njiru Njenje was included in the distribution. In this regard, that submission is misplaced. The second issue is the fate of Patrick Kahenya Rubara's share in the estate. Although the appellant appealed against the aforesaid confirmation of grant, he neither joined the said Patrick Kahenya Rubara as a party nor did he serve him with a notice of the existence of the appeal. Accordingly, in making any decision the rights and interest of the said Patrick Kahenya Rubara cannot in any way be affected. That is the law. A party's rights cannot be affected in a proceeding that he is not a party to or has no notice of.

9. Finally, there is the issue that the trial court did not have jurisdiction to entertain the matter on the grounds that the protest should have been referred to the High Court and that the estate was of a value of over Kenya shillings 100,000/=(one hundred thousand) allowed under the law. The appellant did not cite any law, neither am I aware of any provision of the law which requires that a protest should only be heard by the High Court. That may be the case with an application for annulment or revocation under section 76 of the Act but not a protest such as the one the trial court was dealing with.

10. As regards the value of the property, although the petition disclosed that the value of the property was Kenya shillings 300,000/= three hundred thousand, three (3) things militate against interfering with the decision of the court based on the issue of jurisdiction. Firstly, it is the appellant himself who lodged the petition in the Chuka Principal Magistrate's Court. He must have been aware that the value of the property was within the jurisdiction of that court. A party cannot submit to or invoke a particular jurisdiction participate in the proceedings and at the end of it, when the outcome is against him/her turn around and state that there was no jurisdiction. In a litigation, a party cannot be allowed to blow hot and cold at the same time neither can one approbate and reprobate in the same proceedings. It will be extremely wrong to allow such a scenario. Secondly, there was no evidence that was led at the trial to show that the estate was in excess of the jurisdiction of the trial court which is the forum the appellant had chosen. The court cannot speculate as to the value of the estate in the absence of concrete evidence. Finally, will it be just to interfere with the decision of the trial court at this juncture on the sole ground of jurisdiction when the parties and the court engaged in the exercise of succession of the estate of the deceased since 16th September, 2008, had more than ten (10) witnesses testify until 23rd June, 2010, then turn around and allege lack of jurisdiction? I do not think so. For the foregoing reasons, and for the reason that the issue of jurisdiction was not raised either before the trial court or in the memorandum of appeal, I reject the submissions that the trial court did not have jurisdiction to deal with the matter.

11. I will now deal with the grounds of appeal as appearing in the memorandum of appeal. The first ground was that the trial court erred in failing to distribute the estate of the deceased equitably and fairly. The record shows that the appellant did not appeal against the ruling of Hon. C. N. Ndubi of 18th December, 2009. In that ruling, the court made various findings of fact based on the evidence presented by the parties and their witnesses. Some of these findings were that; there was no evidence that the respondent had been given any land by the deceased; that the respondent was a direct and equal beneficiary of the estate; and that Patrick Katheranya Rubara be given one (1) acre. That being the case, those findings still stand and cannot be upset at this stage as that ruling was not appealed against. The appellant only appealed against the certificate of confirmation which was about the distribution effected by the court on 23rd June, 2010.

12. The law relating to intestate distribution of estates is provided for in sections 38 and 40 of the Act. Section 38 of the Act provides:-

“38 where an intestate has left a surviving child or children but no spouse, the

net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

Section 40 of the same 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.*

13. In the case of Nyeri CA relied on by Mrs Ntarangwi No. 3 OF 2015 Stephen Gitonga M’Murithi – vs –Faith Ngira Murithi, the Court of Appeal held: -

“The appellant’s complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 enshrines the principles of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased.”

14. From the foregoing, it is clear that in distributing an estate of a deceased who has died intestate, the court has to apply the principle of equal distribution of the net estate to the surviving children. In the present case, the trial court found as a fact, which was never challenged, that all the daughters of the deceased did not wish to participate in the distribution. That those entitled to share in the estate were the two surviving sons of the deceased, the appellant and the respondent. The third beneficiary had had his share of one (1) acre pre-determined by the deceased himself before his demise.

15. The question to be answered therefore is whether the trial court was guided by the principles set out in sections 38 and 40 of the Act. The total acreage available for distribution after taking away the predetermined share of Patrick Kathenya Rubara was approximately 6 acres. These are made up as follows:-

1. Mwimbi/S. Magumango/139 - 5.5 Acres
2. Mwimbi/S. Magumango/984 - 0.20 Acres
3. ½ share of plot no. 30 Mwira Market

To this court’s estimation, the distribution contained in the certificate of confirmation tried as much as possible to abide by the principles set out in section 38 of the Act. Accordingly, ground 1 is rejected.

16. The second ground was that the trial court failed to consider the appellant’s submissions as a result of

which it arrived at a wrong decision. Looking at the decision of the court, it may be true that the trial court may not have mentioned the submissions of the appellant dated 28th April, 2010. The court seems to have been guided by the evidence presented in court. The appellant's submissions seem to suggest that some property known as Mwimbi/S. Mugumango/63 measuring 3.46 acres had been given to the respondent. At the trial however, the existence of that property was not proved. A copy of the green card was never produced to show that the alleged property initially belonged to the deceased and that it was later transferred to the respondent. That being the case, the decision of the court on that aspect cannot be faulted. The entire submissions of the appellant revolved around that the respondent was not entitled to participate in the distribution of the estate of the deceased. Having failed to prove that fact, those submissions became of no use to the court in arriving at its decision. That ground is also rejected.

17. The final ground is that the trial court erred considering the entire evidence produced. This court has reviewed the evidence presented before the trial court. It was established that Patrick Kathenya Rubara had been given one (1) acre. It was also established that the only surviving children of the deceased who were entitled to share in the deceased's estate, were the appellant and the respondent, that the rest of the children of the deceased, being married daughters and a widow who had not remarried, were not claiming anything from the estate. The evidence also established the three (3) properties set out above as the only assets of the estate available for distribution. In this regard, having regard to the foregoing, this court makes a finding that the trial court's decision was in accordance with the evidence presented before it. The third and final ground therefore is also without merit and it is hereby rejected.

18. Accordingly, the entire appeal is without merit and it is hereby dismissed with costs.

DATED and delivered at Chuka this 9th day of June, 2016.

A.MABEYA,

JUDGE.

Judgment read and delivered in open court in the presence of the parties.

A.MABEYA

JUDGE

9/6/2016