



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL CASE NO. 135“B” OF 2011
NASARIO MURIITHI NDWIGA.....1ST APPELLANT
ROSEMARY WARUE NJIRU.....2ND APPELLANT
VERSUS
RICHARD NJAGI NDWIGA.....RESPONDENT

(An Appeal arising from the judgment of Runyenjes Succession Cause No. 129 of 2009

delivered on 13th October, 2011)

J U D G M E N T

This is an appeal against the judgment of Runyenjes Succession Cause No. 129 of 2009 which was fully heard between the parties and judgment delivered on 13/10/2011. The appellants in their memorandum of appeal filed in court relies on the following grounds.

- 1. That the learned magistrate ignored the fact that the deceased had shared out his estate during his lifetime;*
- 2. That the court disregarded the wishes of the deceased to the effect that parcel No. KYENI/MUFU/3940 was to be inherited by his four daughters in exclusion of the respondent;*
- 3. That the learned magistrate failed to consider that the respondent had been given land by the deceased and did not deserve a share in KYENI/MUFU/3940;*
- 4. That the grant was confirmed based on defective evidence;*
- 5. That the court erred when it failed to consider that the deceased had left an oral will;*
- 6. That the documents produced in court were not taken into consideration by the court.*

The 1st appellant was the petitioner in the Runyenjes succession cause while the 2nd appellant and the respondent herein were the protesters respectively whose case were quite at variance with each other.

The petitioner's case was bent towards his sister the 2nd appellant herein getting parcel No. KYENI/MUFU/3940 for herself and her three sisters. The respondent who is a step brother to the appellants was pursuing his share in the estate of the deceased consisting of only KYENI/MUFU/3940.

The duty of the first appellate court was spelt out by the Court of Appeal in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** as follows:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

The case of the first protester was that Richard Njagi Ndwiga was that he was the only child of the deceased by his second wife for purposes of inheritance. He testified that the first wife had one son the petitioner and four daughters including the second protester. It was his evidence that during his lifetime the deceased sub-divided his parcel of land KYENI/MUFU/873 into three equal parcel measuring 1.75 acres each. He gave one of the parcel to the petitioner KYENI/MUFU/3939 and gave No. 3941 to the 1st protester (himself). The other parcel No. 3940 was registered in the name of the deceased. The deceased did not leave a written will and the first protester proposed the following mode:

1st protester – $\frac{3}{4}$ acre

petitioner – $\frac{3}{4}$ acre

2nd protester $\frac{3}{4}$ acre to hold in trust for herself and her three sisters.

The 2nd protester testified that the deceased had shared out his land to his sons in his life time by giving the petitioner and first protester each one parcel being Nos. 3939 and 3941. Her evidence was that the deceased said that the remaining parcel No. 3940 should be inherited by his four married daughters including herself. The 1st appellant and the respondent were not entitled to any share of parcel No. 3940 because they got their shares before deceased died. However, she proposed that her elder brother the 1st appellant should be registered to hold the land in trust for the daughters which was the wish of the deceased.

The petitioner's case was that he and the respondent were given their own parcels of land and ought not to inherit any share from No. 3940 which the deceased left for his four married daughters. He said his name should be included in this parcel upon succession as the person to take charge of the land. In cross examination by the protester's counsel the petitioner said he does not want a share in the estate lest he be cursed. He said his father left an oral will as to how his estate should be shared.

The petitioner called two witnesses to support his evidence. The first one testified that she came from the same clan with the deceased and that before he died he told her that his land was to be inherited by his daughters. She said the deceased's sons and witness No. 2 were present and that the deliberations were put down in writing.

The second witness testified that the deceased called him and the said remaining land was to be left for his daughters and that the petitioner should be in charge of deceased's home. He said the will was written by one Njue Mbugua but he does not remember affixing his signature.

The court in its judgment there was no written will which was produced by the petitioner and 2nd protester whose cases were based on a written will. The court dismissed a copy of a purported will annexed to the petitioner's submissions on grounds that it was was not produced in evidence. The magistrate found that there was no valid oral or written will. The estate was therefore distributed between the children of the deceased as follows:-

KYENI/MUFU/3940

- Respondent – $\frac{1}{2}$ share

- ½ share to hold in trust of the 4 daughters of the deceased to be registered jointly.

The 1st appellant did not get any share for he had indicated to the court that he did not want a share to avoid being cursed.

The appellants in their submissions urge this court to reverse the judgment of the learned magistrate and adopt the provisions of Section 42(a) and (b) of the Succession Act which provides:-

42(a) An intestate had 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 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

The provision calls the court for to take into account any property or any debt paid in favour of a child or grandchild during deceased's lifetime to be considered in distribution of the estate. The appellant urges the court to consider that the respondent had been given his own land by the deceased and is therefore not entitled to any share in parcel No. 3940. In the alternative, the appellant urges the court to distribute the parcel of land equally among all the children of the deceased.

The respondents argue that there was no will and that the court distributed the estate fairly leaving out the 1st appellant for he had denounced his inheritance. In the absence of a will the Respondent was entitled to a share in the remaining parcel of the deceased. The magistrate was correct in giving him half share of the land. He was a child of the deceased and was treated as such during the lifetime of the deceased. He and the 1st appellant were given equal shares by the deceased in their respective parcels No. 3939 and 3941. The four married daughters were given half share of the land which was fair.

It is not in dispute that the deceased was married to one wife who was the mother of the appellants among other children. It is also not disputed that the deceased had a child born out of wedlock who is the respondent herein and whose mother did not marry the deceased. The deceased during his life time took care of the respondent and treated him equally with the first appellant for the two were his only sons. The other four children were daughters who are married and who were represented in the succession cause by the 2nd appellant. There was no evidence adduced in court on whether the deceased was survived by his widow or whether she died before the succession case was determined. The 1st appellant applied for letters of administration intestate and only named himself and his four siblings as the survivors of the deceased. The trial magistrate worked on the assumption that the deceased was survived by only his six (6) children including the respondent.

The issues for determination in this appeal have been identified as follows:-

- 1. Whether the deceased died intestate;*
- 2. Whether the respondent was entitled a share or the half share awarded in respect of KYENI/MUFU/3940;*
- 3. Whether the 2nd appellant and her three sisters got a just and fair share out of the deceased's estate;*
- 4. Whether any costs are payable and who should bear the burden.*

During the hearing of the case, the appellants who alleged that the deceased left a will did not produce any written will or prove that there was any oral will. The two called joint witnesses who told the court that they were told by the deceased that the remaining parcel KYENI/MUFU/3940 was bequeathed to the four married daughters of deceased. None of them signed any written agreement or will during the meeting. The person who was said to have reduced the wishes of the deceased in writing one Njue

Mbugua was not called to testify. The document attached to the first appellants submissions was not signed by the witnesses whose names appear at the bottom of the page. The document was not produced in evidence as required. The magistrate was right to disregard it since it was not admissible in evidence. The appellants and their witnesses did not adduce sufficient evidence to prove that any oral will ever existed.

When the first appellant filed this case on 17th December 2009, he filed it as an intestate succession. It was after the respondent filed a protest that the appellant came up with the idea of a will having been made by the deceased. If there was any will at the death of the deceased, then it did not make sense to file an intestate succession. I agree with the respondent that the claim that there was a will by the appellants was an afterthought aimed at denying the respondent of his inheritance. It is important to note that his name was left out in Form P&5 while those of all the other children of deceased were included.

It came out in the evidence of the parties and that of the appellant's witnesses that the respondent was a child of the deceased. The deceased gave him land in equal shares with the first appellant. The first appellant was not well intentioned when he left out the respondent's name in this case.

I come to the conclusion that the deceased died intestate and that his estate should be distributed on that basis.

The deceased is survived by six children, two sons and four daughters. The appellants argued that Section 42 of the Act should be considered by the court or in the alternative the land be distributed to all his children equally. The 2nd appellant's case was bent in having her brother the first appellant included in the sharing of the only land available for distribution KYENI/MUFU/3940.

She argued that the respondent should not be included at all because he has another parcel of land. The truth of the matter as established by the evidence of the parties and their witnesses is that the two sons of deceased got equal shares upon sub-division of the original parcel. These are KYENI/MUFU/3939 and 3941. The deceased was left with LR. 3940 which he used during his lifetime since all the daughters were married.

The law of succession does not discriminate against married or unmarried daughters of the deceased. It treats all daughters and all sons of the deceased as children entitled to equal shares in the estate.

Section 42 provides that previous property given or shared out by the deceased may be considered while sharing out the estate. The deceased has a right to give out gifts to any person during his lifetime. In the case before me, the appellants want Section 42 to apply only as far as the respondent is concerned but not in the case of the first appellant. This in itself is discriminatory and unacceptable.

The first appellant was said to have denounced his share in the estate. This was just an answer he gave to a question by the respondent's counsel during cross-examination and it cannot be said to affect his rights of inheritance. He ought to have been given his share, if any, and leave it to him to decide whether to donate to one of his sisters or step-brother.

The law applicable in the circumstances of this case is Section 38 of the Act.

Section 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.

The magistrate therefore erred in law in distributing the estate in two equal shares which is applicable to a situation where the deceased is survived by only two widows and no children or by only two children. The distribution was not based on the law as provided for in the Succession Act. In this case the six (6) children of the deceased are entitled to equal shares in the estate of the deceased. I therefore find this

appeal partly successful and make the following orders.

1. That the distribution by the learned magistrate is hereby set aside;

2. That the six children of the deceased:- Nasario Muriithi, Richard Ndwiga, Rosemary Warue, Luciana Ciumwari, Mary Njoki and Angela Muthoni are hereby awarded equal shares out of LR. KYENI/MUFU/3940;

3. That each party to bear their own costs in this appeal and in the court below.

DELIVERED, SIGNED AND DATED AT EMBU THIS 27TH DAY OF JANUARY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Ithiga for Respondent

Both appellants

F. MUCHEMI

JUDGE