



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 147 OF 2014

BEATRICE KABULI NDAMBIRI.....APPELLANT

-VERSUS-

BERNARD NYAMU GACHURE.....RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Court (S. N. Mbungi) Succession Cause Number 101 of 2005 delivered on 25th June, 2010)

JUDGMENT

1. **Beatrice Kabuli Ndambiri**, the appellant herein, was a protestor in **Kerugoya Principal Magistrate's Court Succession Cause No. 101 of 2005** which was a cause brought by the Respondent herein as the petitioner for Letters of Administration in the estate of the late **GICHURE NJAGI** (deceased). The late **GICHURE NJAGI** (deceased), died on 3rd November, 1999 and left behind seven (7) children. The record from the lower Court indicates that one of the children, **JAMES NJAGI GICHURE** later died before the petition for Letters of Administration which was done on 30th May, 2005. At the time of Confirmation of Grant there were six (6) surviving dependants among them the Appellant and the Respondent herein. The Appellant had protested to the mode of distribution of the estate proposed by the administrator who had proposed that the estate be shared out equally among the surviving children. The learned trial magistrate however, overruled her protest and decided that the estate be distributed equally among the surviving children. The Appellant being dissatisfied filed this appeal and cited the following grounds:

2. (i) *That the learned magistrate erred in law and fact by condemning the appellant unheard and delivered a judgment without hearing the parties.*

(ii) *That the learned magistrate erred in fact and in law in distributing the estate according to the children when the deceased was polygamous.*

(iii) *That the learned magistrate erred in law and fact in failing to take into account that some children of the deceased are dead and some daughters were married.*

(iv) *That the learned magistrate erred in fact and in law in failing to take into account the size of appellant's occupation of the deceased's land and the developments she has made on the land.*

(v) *That the learned magistrate erred in law and fact in failing to make a finding that the petitioner's proposed mode of distribution was discriminatory, unfair and selfish.*

(vi) *That the learned magistrate erred in law in failing to distribute the deceased property according to houses and in making the order of 25th October, 2010.*

3. The Appellant's counsel, **Anne Thungu**, further made oral submissions in support of the above grounds at the hearing of this appeal and really did not say much apart from trying to introduce a new ground to the appeal which was the issue of jurisdiction. This court, however finds that the new ground could not be introduced without leave of this court in accordance with the provisions of **Order 42 rule 4 of the Civil Procedure Rules**. The issue appeared to be an afterthought by the Appellant as the issue was not even raised at the subordinate Court.

4. The deceased in the cause in the Court below passed on after the commencement of the relevant law in Kenya that deals with succession matters. **Section 2(1) of Law of Succession Act (Cap. 160)** clearly states as follows:

.....“the provisions of this Act shall constitute the Law of Kenya in respect of and shall have universal application to all cases of intestate and testamentary succession to the estates of deceased persons dying after commencement of this Act and to the administration of estates of those persons.”

The commencement date of the law is indicated as 1st July, 1981. It is not in dispute therefore as to what law was applicable to the distribution of the estate of **GICHURE NJAGI**.

5. I have looked at the mode of distribution suggested by the Respondent in the lower Court which was to have the estate comprised in those parcels of land known as (**KABARE/MUTIGE/67 and MUTIRA/KANYEI/585**) divided equally among the surviving dependants. The same was resisted by the appellant, who apparently is the daughter in law to the deceased by virtue of marriage to the deceased son of the deceased in the cause. According to her protest she suggested as she argued in this appeal that the estate should have been divided according to houses as the deceased was married to two wives in accordance with customary law. The lower Court however, overruled her and correctly so because her wishes were contrary to clear provisions of the law. The provisions of **Section 2 (2) of the Law of Succession Act (Cap. 160)** states that the application of customary law in the estates of deceased persons only apply to estates of persons dying before the commencement of the **Law of Succession Act. (1st July, 1981)**. The Appellant's contention in the lower Court and in this appeal is a misconception and cannot be sustained in law.

6. The Appellant contended that she was not accorded a chance to be heard at the subordinate Court. This Court prompted the Appellant to tell this court what it is that she wanted to tell the lower Court and the only information coming out was what was contained in the affidavit of protest sworn on 17th October, 2010 which was that the deceased was polygamous with two (2) wives both of who were deceased at the time and by virtue of that, the estate should be divided into two. This as I have observed was not sustainable in law and I find that the Appellant really suffered no prejudice at the lower Court.

7. The Appellant's contention that some of the children of the deceased were dead and some daughters were married was really unsupported in the lower Court. The Appellant was also unable to tell this Court what prejudice if any, was suffered as a result of the same and she could not give details. This Court therefore finds no basis in that regard.

8. On the 4th ground, the Appellant faulted the learned magistrate for not taking into account the size of estate the Appellant was occupying and the developments made. I am however, not persuaded since the same was immaterial. The trial learned magistrate applied the law in accordance with **Section 40 of Law of Succession Act** and distributed the estate equally among all the dependants. **Section 38 and 40 of Law of Succession Act** provides that where an intestate (as was the case here because there was no Will) leaves no surviving spouse, the estate should be divided equally among the children. The Appellant herein though not a child of the deceased, was given an equal share and I would agree with the Respondent that she really has no basis to complain.

9. I would agree with the Respondent who opposed this that the Appellant really did not properly establish her status at the lower Court. She claims that she was married to **DANSON NDAMBIRI GICHURE** a deceased son to **GICHURE NJAGI (DECEASED)** but really did not place any material to show that she had lawfully been appointed the administratrix of the estate of her husband **DANSON NDAMBIRI GICHURE** to give her *locus* to challenge the distribution of the estate of the late **GICHURE**

NJAGI. Be that as it may I do not find any basis to fault the learned magistrate because the Appellant admitted that the deceased left no Will. How then can she say that the trial learned magistrate discriminated her by not following the wishes of the deceased when the Appellant through her counsel knows that such wishes are only binding if they are expressed in a valid Will?

10. I do find that the Appellant's contention in that regard is without any basis in law and this also applies to her ground five of the appeal. The order made by the trial learned magistrate was in respect to how the distribution was to be done. The order given in accordance with the law and the Appellant was not discriminated in any way.

11. Finally in exercise of my appellate jurisdiction under **Section 50** of the **Law of Succession Act** and **Section 78** of **Civil Procedure Act** and **Order 42 rule 32** of the **Civil Procedure Rules** I find no merit in this appeal. The same is dismissed with costs. The distribution of the estate of the late **GICHURE NJAGI** shall be done in accordance with the grant as confirmed by the lower Court on 12th July, 2010. The County Surveyor in the company of security provided from the area District Officer (sub-county officer) shall visit both properties and survey the land and subdivide the same to each beneficiary named in the confirmed grant taking into consideration where each beneficiary has constructed houses they live in. The Deputy Registrar directed to facilitate signing of transmission forms if any, of the beneficiaries is reluctant to cooperate and the County Lands Registrar is directed to dispense with production of Personal Identification Numbers or Identity Cards by beneficiaries who may be reluctant to cooperate to finalise this matter and bring it to an end. It is so ordered.

Dated and delivered at Kerugoya this 20th day of May, 2015.

R. K. LIMO

JUDGE

20.5.15

Before: Hon. Justice R. K. Limo

Court Clerk Willy

Igati Mwai holding brief for Thungu Prosecutor

Respondent absent.

Appellant present

COURT: Judgment signed, dated and delivered in the open Court in the presence of Igati Mwai holding brief for Anne Thungu and in the absence of the Respondent.

R. K. LIMO

JUDGE

20.5.15