



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 13 OF 2012

D N G.....1ST APPELLANT

C W G.....2ND APPELLANT

-VERSUS-

T W G.....RESPONDENT

[Being an Appeal from Judgment of Nyahururu Senior Resident Magistrate Court in Succ.
Cause. No.7 IN THE MATTER OF THE ESTATE OF S G of 2007 by Hon. A. B. Mongare
dated 10th January, 2012]

JUDGMENT

BACKGROUND

The proceedings concerned the Estate of S G K (hereinafter referred to as the "deceased") who died intestate on 24/12/2005 at Nyahururu. The deceased was polygamous during his life and upon his death he was survived by:

THE FIRST HOUSE

(a) T W G.....the 1st wife

THE SECOND HOUSE

(a) M W G 2nd wife

(b) D N G.....17 years

(c) C W G.....14 years

(d) E K G.....10 years

(e) A W G.....8 years

T W G (hereinafter referred to as the Respondent) and M W G (hereinafter referred to as the 2nd administrator) petitioned for and were issued with a Grant of Letters of Administration by the lower court

on 26th February 2008. The two filed summons for Confirmation of Grant. They annexed to it a supporting affidavit sworn by both administrators wherein they proposed the mode of distribution of the property.

However, the 2nd administrator later filed an Affidavit of Protest against confirmation of the Grant on 4th December 2008. Her children, D N G and C W G also filed a joint Affidavit of Protest on 30th March 2009. The three did not agree to the manner in which the property had been distributed and alleged that the same should be divided as per the wishes of the deceased. They also accused the Respondent of not accounting for the rents she had been collecting from a Kiosk at [particulars withheld] Trading Centre which had been allocated to the deceased by the County Council of Nyahururu.

On the court's direction the matter was heard by way of *viva voce* evidence. The 2nd administrator, who is now deceased, testified as **PW1**. She married the deceased as his second wife in the year 1995 and they had four issues. She told the court that before his death, the deceased divided his property to his children. He directed that his wives would hold the property in trust for them. He wrote a letter articulating these instructions which he gave to his brother S W.

However W refused to produce this letter after the deceased died. She conceded that during a family meeting held on 28th December 2005, she and the Respondent agreed to share the property equally between the two houses. She acknowledged that she signed several documents whose contents she did not understand because she does not speak English.

Notwithstanding this agreement, **PW1** was not content. She wanted the entire property to be given to the children as per the wishes of the deceased. She proposed that the children who had attained the age of majority be given their shares and that she holds the shares for the younger children in trust for them. She filed the Affidavit of Protest when she realised that the Respondent had been allocated property not held in trust.

C W (**PW2**) who is a daughter of **PW1** also reiterated that the deceased left a written will in the custody of S W which allegedly was destroyed by the Chief. She proposed that the property be shared among the children and the two wives of the deceased. She wanted both wives to be given a kiosk which the deceased had been allocated by the County Council of Nyahururu which she maintained was still in the name of the deceased as at the time of the hearing. She contended that the agreement by the family members is not binding to the rest of the children because they were not party to it.

The Respondent testified that she married the deceased in 1976. After the death of the deceased, the family held a meeting in the presence of the two widows, the deceased's brother, the family's chairman and a secretary and agreed on how to settle the property. She produced a copy of this agreement dated 28th December 2005 as "**PExh.1**" which was executed by both wives. Most of the movables were divided equally and the rest sold to settle the debts of the deceased.

The two entered into a subsequent agreement wherein they agreed to share the kiosk equally. This kiosk was however repossessed and allocated to a third party by the County Council because of non-payment of rates. The Respondent proposed that the property be divided according to the family agreement and the further agreement between herself and her co-wife. She had no objection to the children of the second house being issued with the kiosk.

S W K, the deceased's brother also confirmed that the wives amicably agreed to divide the property equally. Each then occupied her respective portion as agreed. The children did not participate in the meeting because they were too young.

In its judgment, the lower court found that the Respondent was entitled to a larger share of the property as she had contributed to its acquisition. Therefore, the court upheld the mode of distribution as proposed the administrators in their joint affidavit sworn in support of the application for the Confirmation of Grant dated the 6th October 2008 wherein the property had been divided equally between the two houses. The

court also directed D N G and C W to hold their houses share in trust for their other two siblings.

GROUND OF APPEAL

The two appellants are the children of the deceased and the 2nd administrator also now deceased. In the Memorandum of Appeal dated 20th January 2012, the appellants have cited seven grounds on which they rely on in support of their appeal against the above judgment of the lower court:

THAT the learned trial Magistrate erred in law and in fact in-

- i) finding that the Respondent had contributed to the acquisition of the properties of the deceased and thus awarding her a larger share;**
- ii) failing to find that the Appellants had not consented to the mode of distribution of the estate of the deceased as proposed by the Respondent and M W G (deceased) and for adopting the same;**
- iii) adopting the mode of distribution agreed on by the relatives of the deceased who had no mandate to distribute the estate;**
- iv) disregarding the provisions of Section 40 of the Law of Succession Act in distributing the estate of the deceased;**
- v) giving the Respondent ½ share of the estate of the deceased and the remaining ½ share to the four children of the deceased contrary to Section 40 of the Law of Succession Act;**
- vi) finding that the deceased's kiosk at [particulars withheld] Trading Centre had been repossessed by the Nyandarua County Council without any evidence to support this finding; and**
- vii) disregarding the submissions by counsel for the appellants and the authorities supplied and in distributing the estate of the deceased on wrong principles.**

SUBMISSIONS

Counsel for the appellants submitted that the decision of the lower court did not accord with the provisions of Section 40 of the Law of Succession Act in that the estate of an intestate who was polygamous should be divided **“to the houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.”**

The trial magistrate was faulted for relying on an agreement which was illegal and had no force of law. Firstly, it was authored by persons who did not have locus as they were neither beneficiaries nor legal representative of the estate of the deceased. Secondly the document purported to distribute the property of the deceased prior to acquisition of the grant of Letters of Administration contrary to Section 55 of the Law of Succession Act. Thirdly the children of the deceased did not participate in the making of the agreement and their interests were not taken into account.

Counsel also faulted the trial magistrate for awarding the Respondent a larger share of the property on the ground that she had contributed to its acquisition yet there was no such evidence that was presented.

Finally Counsel submitted that the court failed to include the kiosk in the properties that were distributed to the beneficiaries alleging that it had been confiscated by the Municipal Council for non-payment of rates whereas there was evidence that it existed in the name of the deceased. He asked the court to redistribute the property.

Counsel for the Respondent relied on the submissions filed in the lower court on 22nd November 2011. He submitted that the 2nd administrator's protest was an afterthought because the evidence suggested that

she was aware of and had conceded to the property being divided equally.

According to Counsel, the trial court properly distributed the property equally between the two houses. He argued that equality under the Law of Succession Act does not necessarily mean equal distribution of property. That contribution is an important factor that has to be taken account in dividing the property. He referred the court to the decisions in **Peter Kimani Munji V. Susan Wanjiku Munji & 6 Others**, Nakuru HCCA NO. 223 OF 2001 [U/R], **Re: Kaara's Estate**, [1999] LLR 1115 (HCK) where the court awarded larger portions to the beneficiaries who had participated in the acquisition of the deceased's assets.

ISSUES FOR DETERMINATION

I have carefully perused the record of the lower court and considered the submissions of Counsel. The issues for determination in this appeal are:

(a) whether the agreement dated 28th December 2005 was made in contravention of the provisions of the Law of Succession Act and if it is void;

(b) whether the property should be divided as per the said agreement, or in the manner proposed in the affidavit sworn in support of the summons for confirmation of the grant on 6th October 2008 or as per the provisions of **Section 40** of the **Law of Succession Act**;

(c) whether the kiosk rented to the deceased by the County County of Nyandarua constituted part of his estate at the time of Confirmation of the Grant and which should have been distributed to the beneficiaries.

ANALYSIS

This being the first appellate court it behoves this court to reconsider the evidence on record, re-evaluate it and to arrive at its own independent findings and conclusions always bearing in mind that this court neither saw nor heard the witnesses. Refer to the case of **Selle and Anor V. Associated Motor Boat Company Ltd and Others**, (1968) EA 123.

Distribution as per the Agreement

The question of law for this court to determine is whether the terms of the agreement that the property of the estate be distributed equally between the two widows can be upheld.

The first and second wives entered into an agreement regarding the distribution of the property. The agreement is dated the 28th December, 2005 which was four (4) days after the demise of their husband, the deceased herein. The agreement I also note is prior to their Petitioning the Nyahururu Court for a Grant of Letters of Administration, which was done on the 15th of January, 2007.

This first agreement is founded on a family meeting between the two widows and close relatives and was written in Kikuyu and has a Certified Translation. I reiterate that this agreement was entered into before the Nyahururu Succession Cause had been filed and a Grant of Letters of Administration issued to the administrators. At that point in time none of the parties was authorized to distribute or dispose of the property.

The Law of Succession Act (hereinafter referred to as the Act) is the law that applies to the property of any person who died intestate after its operation. It provides that upon the death of a person, his property shall vest in his personal representatives appointed in terms of the Act who are then in charge of its administration and distribution to the beneficiaries.

Section 45(1) of the Act prohibits any person, for any purpose, from taking possession, disposing of or otherwise intermeddling with any free property of a deceased person, except so far as expressly

authorized by the Act, or any other written law or by a grant of representation.

It is this court's considered view that the first agreement that provided for the equal division of the deceased's Estate in two halves amongst the two wives houses was probably done to restore peace and equilibrium between the two houses. The pattern of distribution though reconciliatory and done with the best of intentions of the attendees at that time had no legal basis and was tantamount to intermeddling at that point in time.

Further it also departs from the general pattern of distribution of the Estate of a deceased polygamous man's Estate which is subject to division into units as provided by **Section 40** of the **Law of Succession**.

But it is interesting to note that when the two widow/ administrators filed for Confirmation of the Grant they did not depart from the terms of this agreement as they observed and incorporated its terms in their proposed mode of distribution.

This court is satisfied that the exercise of distribution of the Deceased's Estate as per the Agreement was not done through a legally established process and was therefore not legally binding before the Grant was obtained and at that time these actions amounted to intermeddling.

But when the two widow administrators acquired *locus standi* and adopted its terms by signing the Affidavit they breathed life into the Agreement and made it a legally binding document and it has all the essential ingredients of a contract.

This court is satisfied.

Distribution as per the Letter/Will

An affidavit was jointly sworn in support of the application for Confirmation of the Grant by the two administrators and it contained a proposed equitable mode of distribution in the eyes of the two widows of the deceased.

The second administrator later changed her mind and filed her Affidavit of Protest basing her change in mind on a letter/will written by the deceased which was supposedly in possession of her brother in law namely S W. The letter/will she contends in her evidence contained the wishes of the deceased that the properties were to be registered in the joint names of two widows - administrators to be held in trust for the children of the deceased.

That S W her brother in law was privy to the contents of the Letter/will as the deceased when he was ailing in hospital had called him and told him how the properties were to be shared and that he also had possession of the Letter/will.

This contention was also adopted in the testimonies of C W (**PW2**) that the deceased left a will which was in possession of one S W.

It is trite law that he who alleges a fact is obligated to prove it. The letter that the deceased allegedly wrote indicating his wishes was not produced into court by the parties as evidence nor did this S W tender evidence on its terms.

Therefore any evidence by the Protesters on the Letter/Will can only be deemed to be hearsay and that their evidence falls short of the desired standard of proof. Therefore this court is satisfied that the deceased wishes as relates to distribution stand unproven.

Distribution under Section 40 Law of Succession

Counsel for the appellant opined that the property must be divided into units in accordance with the provisions of **Section 40** of the **Law of Succession Act, Cap 160** which is the law that provides for the

administration of the Estate of a polygamous deceased person. **Section 40** provides:

“40(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.”

Counsel for the appellants submitted that the division of the property outlined their proposed mode of distribution in their written submissions which is as follows:

a) TERET W G:

- To get (1) one acre to be excised from NYANDARUA/SILIBWET/[**particulars withheld**] where she had built her house

- To get 1/5 of NYANDARUA/SILIBWET/[**particulars withheld**]

b) D N G

C W G

E K G (Minor)

A W G (minor):

- To get the remaining 3 acres to excised from NYANDARUA/SILIBWET/[**particulars withheld**]

- To get NYANDARUA/SILIBWET/[**particulars withheld**](1) One acre

- To get the remaining portion of NYANDARUA/SILIBWET/[**particulars withheld**]

- To get KIOSK AT [**particulars withheld**] TRADING CENTRE

This court's considered view on the above proposed mode of distribution is selective and not equitable and is also not workable on the ground.

Selective in that, the appellants have not divided into respective units the property, namely, NYANDARUA/SILIBWET/[**particulars withheld**]. This property forms part of the Estate of the deceased that had been allocated to their mother the 2nd Administrator as proposed and set out in the Agreement and the Supporting Affidavit dated 6.10.2009.

On the issue of workability on the ground; From the evidence adduced by the 2nd Administrator before her demise, there appears to be no love lost as between the Appellants, their deceased mother and the Respondent. She alluded to the fact that the Respondent as having been divorced by the deceased and therefore, had no entitlement to make any claim to the Deceased's Estate.

Further she testified that she filed her Protest because she did not understand the terms of the Affidavit and her intention throughout was to honour the deceased's wishes which was that the properties would all be given to her children but in the meantime , any share held by the first wife would be held in trust for her (the 2nd Administrator's) children.

The innuendo or inference in the 2nd Administrator's above proposed mode of distribution is to deprive the Respondent of her interest in the property of the deceased due to the fact that she had no children of her own and this stand is tantamount to stigmatisation and discrimination.

This court opines that each case has its own peculiar circumstances and from the facts and evidence placed before it, it behoves this court to do what is just and equitable within the confines of the provisions of **Section 40 of the Act**.

This court is satisfied after perusing the record that there are three (3) immovable properties and finds that the acreage of each property is not clearly stated nor is there any Valuation Report, old or current to enable or assist the court in making any determination as to fair and equitable units. In the absence of these crucial documents the court is unable to make any determination, hereunder.

Distribution as per the Affidavit dated 6.10.2008

I reiterate that an affidavit was jointly sworn in support of the application for Confirmation of the Grant by the two administrators and it proposed an equitable mode of distribution in the eyes of the two widows of the deceased.

It is trite law that there can be a departure from the application of the provisions of Section 40 when the administrators are in agreement and the children are catered for.

The evidence on record of the Respondent was that she had agreed with her co-administrator that a portion measuring 0.8 acres would be hived off the property known as NYANDARUA/SILIBWET/[particulars withheld] and this was to be the portion be distributed to the 2nd House. Each house was to contribute Kshs.4000/- towards the survey and she tendered into evidence receipts (Exb. 2a and 2b) in the total sum of Kshs.8000/- towards survey fees for the aforementioned property. The property was divided and the administrators then took their respective portions and built their respective homesteads.

The above evidence contains the essential elements of a valid contract; it is in writing; the parties are identifiable and have executed both the agreement and the affidavit; the properties are identifiable ; there is consideration; the documents have all been executed and witnessed.

This court is satisfied that the documents are supportive of and are a true reflection of the intentions of both the administrators preferred mode of distribution which indeed the children are catered for.

Upon re-evaluating the evidence on record this court is satisfied that in essence the decision of the trial court was not erroneous or based on wrong principles of law the only shortcoming was her failure to expound on these principles to support her decision. Save for the distribution of the kiosk, this court is inclined not to depart from the trial magistrates decision.

The evidence on record shows that there is no dispute as to whether the kiosk rented to the deceased by the County Council of Nyandarua constituted part of his estate at the time of Confirmation of the Grant and the Respondent makes no claim over the Kiosk, I need therefore not belabour myself in addressing this issue.

FINDINGS

For the reasons stated above this court makes the following findings;

This court finds that the deceased wishes as relates to distribution of his Estate stands unproven.

This court finds that the exercise of distribution of the Deceased's Estate as per the Agreement was validated when both of the two widows/administrators acquired locus standi and adopted its terms in a jointly executed affidavit.

This court finds that in the absence of any Valuation Reports, old or current, over the three (3) immovable properties this court is unable to make any determination in line with Section 40 of the Act and further finds that this provision has been displaced as there exists a valid agreement as between the administrators

which caters for all the parties.

This court finds that the most equitable mode of distribution of the Estate is as set out by the two Administrators in their joint affidavit made in support of their application for the Confirmation of the Grant which adopts the terms of the Agreement.

This court finds that the Kiosk constitutes part of his Estate and its distribution will be the only item that will not be shared as set out in the aforesaid joint affidavit.

DETERMINATION

For the above reasons the appeal is without merit and I hereby dismiss the same.

I shall uphold the decision of the trial court in Nyahururu Succession Cause No. 7 of 2007 on the mode of distribution of half share to each house.

The distribution of the Estate shall be as follows;

KIOSK AT [particulars withheld] TRADING CENTRE

There being no dispute regarding the kiosk as the first administrator conceded that it be awarded to the second house.

Kiosk - whole share be and is hereby allocated to the 2nd house.

NYANDARUA/SILIBWET/[particulars withheld]

T W G being be and is hereby allocated a share of - 3.15 Acres.

The 2nd House's share shall be - 0.85 Acres - to be held by D N G and C W G in trust for themselves and the two minor siblings.

NYANDARUA/SILIBWET[particulars withheld]

D N G and C W G - whole share to be held in trust for themselves and their two minor siblings;

NYANDARUA/SILIBWET/[particulars withheld]

D N G and C W G - whole share to be held in trust for themselves and their two minor siblings.

This being a family dispute, each party shall bear their own costs of this appeal.

It is Ordered Accordingly.

Dated, Signed and Delivered at Nakuru this 12th day of June, 2015.

A. MSHILA

JUDGE