REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCA NO. 27 OF 2015

(FORMERLY MERU HCA NO. 14 OF 2013)

(An Appeal from the Ruling and order of Hon. P.M. Mutua R.M made on 29th November 2006

in Chuka Senior Resident Magistrate's court Succession Cause No. 65 of 2004)

MATI KAIRANYA…….APPELLANT

VERSUS

FESTUS MUTEGI KAIRANYA…….....RESPONDENT

J U D G M E N T

1. Festus Mutegi Kairanya, the Respondent in this Appeal petitioned for letters of administration intestate for the estate of the late Kairanya Muthio in November, 2004 ***in the Senior Resident Magistrate's Court at Chuka in Succession Cause No. 65 of 2004*** (hereinafter "the Succession Cause"). In that Petition, he disclosed the dependents of the deceased as being Gitari Kairanya Micheni, Kairanya Mati Kairanya, ("the Appellant"), Festus M'Kairanya, Justin Kithatha Kairanya and Edith C. Njeru. The only asset of the deceased was disclosed as being Karingani/Mugirirwa/71. On the basis of that Petition, the Respondent was appointed the administrator of the estate of the deceased on 31st December, 2004.

2. Pursuant thereto, on 4th July, 2005, the Respondent took out Summons for confirmation of the Grant. In the Summons, he proposed to have the estate distributed as follows; that all the named beneficiaries/dependants of the deceased be allocated 0.5 acres. He also proposed that the balance of that property be held jointly by all the beneficiaries. The only beneficiary who was not provided for was one Edith C. Njeru, the surviving widow of the deceased.

3. In September 2005, the Appellant protested against the proposed distribution on the grounds that; one M'Imenti Ngari, a brother to the deceased did cause the land to be registered in the name of the deceased after adjudication; that the said M'Imenti had thereafter divided the land into three portions; one portion for the Appellant and the rest of the land was divided equally between the two houses of the deceased. That the division of the land by M'Imenti was in accordance with customary law. The Appellant protested that all the beneficiaries had been shown by M'Imenti their respective portions which each one had since developed. That the said status had obtained for 35 years and the proposed distribution sought to upset the same. That in any event, one of the named beneficiaries Micheni Kairanya was not a biological son of the deceased and one of the surviving widows had not been provided for. He urged that the proposed distribution be declined and the court do confirm the distribution that the late M'Imenti had

made.

4. The Respondent opposed the Protest and swore that the estate of the deceased consisted 3 acres of land only; that it was contrary to the Meru Customary Law for one to disinherit the children of the deceased. He then proposed that all the beneficiaries of the deceased be given equal shares save for the widow, Edith Ciambaka Njeru, who was to get 0.35 acres. He proposed that 0.15 acres be reserved for a road to serve the distributed portions. He contended that Jotham Micheni Kairanya was a true son of the deceased.

5. The Protest was heard through viva voce evidence. At the hearing, the Appellant told the court that the deceased died in or about 1954, when the Appellant was still young. That the deceased had two wives Rebecca Kairanya and Edith Ciambuba Kairanya. He now contended that Micheni Kairanya and Japheth Gitari were born after the deceased had passed on and that he did not know how the land was supposed to be shared under customary law. That both Micheni Kairanya and Japheth Gitari, although born after the deceased had passed on were nevertheless entitled to a share in the estate of the deceased. On cross-examination, he told the court that he did not agree with the principle of equality; that he did not have evidence to show that Gitari and Micheni were not children of the deceased. He admitted that he had called the clan members who had sat for a whole month and they had decided that there be equal distribution of the land to the children of the deceased and the balance to the surviving widow. He could not tell what age he was when his father died.

6. On his part, the Respondent told the court that on 10th April, 2004, the family met and discussed about the succession of the estate of the deceased. That it was agreed that all the children of the deceased be given 0.5 acres of land and the balance be given to the widow of the deceased. He testified that the Appellant had objected to that mode of distribution and had called the clan whereby the clan met and on 31st August, 2004, and agreed with the Respondent's proposed mode of distribution. On cross-examination, the Respondent told the court that he was about six (6) years when the deceased died. He could not tell when Gitari and Micheni were born, but that it must have been in the 1950s. He denied that under customary law, the eldest son of a deceased is entitled to a bigger portion than the rest of the children. That however, custom demanded that the estate be divided amongst the homesteads. He denied that his proposed distribution was meant to settle any grudge with the Appellant.

7. After considering the evidence and the submissions of counsel, the trial court found the Protest to be without merit and dismissed the same. The court made a finding that customary law applied to the proceedings before it is accordance with Section 2 (2) of the Law of Succession Act (hereinafter "the Act"). It also found that the proposed distribution was equitable and confirmed the grant accordingly.

8. Aggrieved by the decision, the Appellant has appealed to this court setting out four (4) grounds of appeal. These can be summarized into three, to wit, that the trial court misapprehended the provisions of Sections 2 (2) and 40 of the Law of Succession Act; that the proceedings were a mistrial as the court ignored a caveat that was on record and that the trial court erred in holding that the Appellant held a total of one point two (1.2) Acres of land out of the estate which led to a miscarriage of justice.

9. Arguing the Appeal, Mr Mugo Learned Counsel for the Appellant submitted that the trial Court erred in the interpretation of Section 40 of the Act; that since there were two households, there were two (2) units in terms of Section 40 of the Act between whom the estate was to be divided. That each unit was to then divide its share amongst its Children. Counsel submitted that the trial court erred in failing to be guided by customary law as decreed by Section 2 (2) of the Act. He submitted that since the deceased died in the 1950s before the Act came into operation, it was the Chuka Customary Law that was applicable in the Succession Cause. That under that custom, the eldest son was always treated preferentially and that should have been the case in this cause. That the court was wrong in finding that the Chuka custom was repugnant to law and morality. That by the court making a finding that the Appellant was occupying one point two (1.2) acres of the estate, made it look grossly unfair and led the court to make a wrong decision. Finally, that by failing to acknowledge the caveat that the Appellant had filed the proceedings amounted to a mistrial. Counsel urged that the Appeal be allowed.

10. On his part, Mr. Mutani Learned Counsel for the Respondent opposed the Appeal and submitted that the trial court's decision was right in that, it took into consideration the size of the estate and applied the principle of equity set out in Section 28 of the Act; that there was nothing to show that Chuka customary law allows discrimination amongst children. That any such discrimination would be contrary to Articles 2 (4) and 10 of the Constitution of Kenya. According to Counsel, the principle behind Section 40 of the Act is equality; that the court did not misapply Section 2 (2) of the Act and that the Appellant had been given a fair hearing. Counsel urged that the Appeal be dismissed.

11. This being a first appeal, it behoves this court to re-evaluate the evidence a fresh, re-assess the case and make its own independent findings and conclusions. ***See Selle- Vs- Associated Motor Boat Co. Ltd (1968) EA 123***. However, in re-evaluating the evidence, the Court must bear in mind that it did not have the advantage of seeing the witnesses testify in order to gauge their deminour.

12. I propose to deal with Ground Nos. 3 and 2 of the Memorandum of Appeal first, then I conclude with ground Nos. I and 4, separately. Ground No. 3 was that the entire proceedings in the Succession Cause No. 65 of 2004 was a mistrial as the trial court ignored the Appellant's Caveat. I have looked at the record. The Succession Cause was filed on 2nd November 2004. The Appellant then filed a Caveat on 20th December, 2004. The Caveat demanded that nothing be done in relation to the estate of the deceased without notice to him. The grant was issued to the Respondent on 31st December, 2004. When the summons for confirmation of grant was filed on 4th July, 2005, the same was served upon the Appellant whereby he filed his Protest on 30th September, 2005 before the summons was to be heard on 12th October, 2005. It is clear from the record that, when the matter came up for hearing, the Appellant was given leave to file a Supplementary Affidavit in support of his Protest. The Protest was heard by way of viva voce evidence whereby the Appellant was one of those who testified.

13. From the foregoing, it is clear that it cannot be said that there was a mistrial. There was no major step that was undertaken in the Succession Cause without notice to the Appellant. He fully participated in the proceedings and the trial court considered his representations before it rendered its final decision. At no stage of the said proceedings, was any step undertaken without notice to the Appellant and if there was any, no prejudice is shown to have been suffered by the Appellant as a result. Accordingly, that ground fails.

14. The second ground was that the trial court erred in making a finding that the Appellant was occupying an area of 1.20 Acres in the LR. No. Karingani/Mugirirwa/71. Mr. Mugo, Learned Counsel for the Appellant submitted that this finding made it look as if the Appellant was grossly unfair while there was no evidence on record to support that finding.

15. In the testimonies of both the Appellant and the Respondent, it was clear that the Appellant disclosed that he had been allocated 1 acre by M'Imenti and that he wished to be allowed to keep the same. Neither him nor the Respondent alluded to the Appellant being in occupation of 1.20 acres. In its judgment, the trial court made a finding that the Appellant was occupying between one to one point two (1-1.2) acres of land leaving the other five (5) beneficiaries with less than 2 acres to share. Looking at the entire record, this court agrees with Mr. Mugo that the said finding had no basis and was a gross error on the part of the court. That ground succeeds.

16. The other ground was that the trial court misdirected itself on the interpretation and application of Section 2 (2) of the Act in respect of the application of customary law. It was urged on behalf of the Appellant that since the deceased passed in or about 1953/54 before the Act came into effect, the Chuka customary law should have applied. That under the Chuka Customary Law, the eldest son of the deceased, of which the Appellant is, always got a larger share. On his part Mr. Mutani submitted that the trial court was bound to apply the Law of Succession Act.

17. Section 2 (2) of the Act provides-

" (2) The estates of the persons dying before the commencement of this Act are subject to the

written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act"

From the foregoing, it is clear that the estates of those persons who died before 1981 are subject to the written laws and customs applicable at the date of their death. In the present case, it is not in dispute that the deceased died in 1953, nearly 30 years before the Act came into operation. The evidence on record shows that as at the time the deceased passed, the property known as Karingani/Mugirirwa/71 had not yet vested in him. It is his brother M'Imenti who made a follow-up, 18years later, to have it adjudicated and registered in the name of deceased. The official search dated 29/10/2004 shows that the property was registered in the deceased's name on 30th September, 1969! The question therefore that arises is, the written law or custom applicable in terms of Section 2(2) of the Act that which was prevailing at the time the deceased died in 1953 or the one existing in 1969 when the property vested in his estate?

18. Neither the Appellant nor the Respondent addressed the court on the written law applicable to the estate of the deceased at the time of his death. Although it was submitted that the Meru (Chuka sub-tribe) customary law was the one applicable to the estate, no such customary law was proved. In my view, a party who wishes the court to apply a particular customary law, such customary law must be proved by way of evidence. A witness who professes expertise in such customary law must be called go give testimony on such customary law. In the present case, apart from the submissions of Counsel, there was no witness who testified as an expert to the Meru or Chuka customary law which the trial court could be faulted to have failed to apply. To the contrary, the trial court was right in holding that if the Meru customary law sought to favour one beneficiary against the rest, that would be repugnant to justice and morality. There must be a basis as to why one of the beneficiaries has to get a bigger share than the rest. Atleast in this case that was not proved.

19. The record shows that the Appellant produced contradictory and unsubstantiated evidence. He told the court that two of the beneficiaries, Gitari and Micheni, were not children of the deceased but nevertheless, he agreed that they were entitled to a share. This was contrary to his earlier assertions in his Protest. He also confirmed that he did not know how the property was supposed to be distributed under customary law. That being the case, which customary law was the trial court supposed to apply which it had failed to? This was not shown to this court. In this regard, I am satisfied that the trial court did not either misinterpret or misapply Section 2 (2) of the Act as contended by the Appellant.

20. The last ground is that the trial court misdirected itself in the application of Section 40 of the Act. It was submitted that Section 40 presupposes that the property the subject of the estate should have first been divided between the two households equally then the said households divide their share between its beneficiaries. On the other hand Mr. Mutani for the Respondent submitted that the trial court was right when it applied the rule of equality which is embedded in that Section

21. Section 40 of the Act 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 shall, in the first instance be divided among the houses <u>according to the number of children in each house but also adding any wife</u> <u>surviving him as an additional unit to the number of children". (Empasis provided)</u>

22. The above provision is clear in its terms. That where the deceased is polygamous, the intestate estate is to be divided amongst the houses according to the number of children whereby each child and widow represents a single unit. This is borne from the words ***"…. 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".*** These words in my view mean, that what is to be considered in an intestate polygamous estate is the individual beneficiaries from each household who individually constitute an independent unit.

23. In this regard, that Section does not provide that the estate is to be divided between the houses equally. Its meaning, in my view, and I so hold that the division is to be between all the children from all

the houses belonging to the deceased as well as his surviving wife/wives each of whom represents an independent unit. The trial court found that the proposed distribution was in accordance with this Section in that, it took into consideration the number of children from each of the deceased households. To my mind, the spirit of equality embedded in Section 40 of the Act was properly upheld by the trial court and that court cannot be faulted. This ground also fails.

24. Accordingly, Ground Nos. 1, 3 and 4 of the Appeal fail while ground No.2 succeeds. However, this courts view is that the success of ground No. 2 has no effect whatsoever on the Appeal. In this regard, the Appeal has no merit and the same is hereby dismissed. I will however due to the partial success of the Appeal not make any orders as to costs.

DATED and delivered at Chuka this 30th day of October, 2015.

A. MABEYA

JUDGE