



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HCCA NO. 39 OF 2006

1. HANNAH NDUTA KWEYA.....1ST APPELLANT

2. MARY WANJIKU KWEYA.....2ND APPELLANT

VERSUS

MWERU KINGETHE.....RESPONDENT

JUDGEMENT

1. The appeal herein arises from the decision of J.O. Were, Resident Magistrate in Thika Principal Magistrate's court succession case No. 229 of 2004. The decision sought to be reviewed was on the distribution of the estate of the deceased, Kweya Kagira.
2. The Resident Magistrate in that cause ordered the equal distribution of the property known as Kiganjo/Kiamwangi/220A between the appellants in the respondent. He declined to take into account an alleged *inter vivos* distribution in favour of the deceased husband of the respondent.
3. The appellants in the Memorandum of Appeal dated 23rd August 2006 have invited me to set aside the decision of the Resident Magistrate made on 9th August 2006 and to order that the deceased's land reference number Kiganjo/Kiamwangi/220A be inherited by the appellants alive to the exclusion of the respondent.
4. I am cognizant of the fact that I am sitting on this appeal as a first appellate court. That being so I have a duty to re-evaluate the evidence tendered before the primary court and thereafter arrive at my own conclusions bearing in mind the fact that I did not have the benefit of hearing the witnesses.
5. The dispute before the appellate court touched on the distribution of the estate of the deceased. There is no death certificate on record, but from the available evidence it would appear that the deceased died intestate sometime in 1966. He died possessed of the parcel of land referred to above – Kijango/Kiamwangi/220A. There is a certificate of official search in respect of the said property dated 25th May 2005, which shows the deceased, Kweya Kagira, as the registered proprietor of the said parcel of land, even though it is not indicated when he got so registered. The parcel measures 6.8 acres. Representation was sought in 2006 and as at that time the immediate surviving members of his family were the parties herein. The appellants are his two un-married daughters, while the respondent is his daughter in law. Grant made jointly to the three of them. From the recorded evidence, the deceased had

married twice, to Wamaitha and Wamure. Both wives are dead. Wamaitha was the mother of Ndungu alias Kangethe the late husband of the respondent. Wamure was the mother of the appellants.

6. Trouble started at the stage of the confirmation of the grant. The respondent proposed that Kiganjo/Kiamwangi/220A be divided between the three parties in certain stated properties. The appellants opposed that. They took the position that Kiganjo/Kiamwangi/220A ought be shared exclusively between them since the respondent's deceased husband and benefited from an inter vivos gift from their father of Kiganjo/Kiamwangi/220B which was subsequently registered in favour of the respondent's husband. Their position was that the respondent ought to be contented with Kiganjo/Kiamwangi/220B. The primary court had to conduct a full trial to determine the matter, and it came to the conclusion stated in paragraph (2) hereabove.

7. Both parties have filed written submissions. The appellant's submissions are dated 27th November 2012 and were filed in court on 14th December 2012. The respondent's submissions are dated 19th February 2013 and were filed in court on 20th February 2013. Counsel for both sides also adduced the court on 15th May 2013.

8. In their written submissions the appellants argue that died possessed of two parcels of land –Kiganjo/Kiamwangi/220A and 220B. The two parcels should be share equally between the three parties. Kiganjo/Kiamwangi/220B had been given to the respondent's husband registered in his name, the appellants case is that the respondent should get Kiganjo/Kiamwangi/220B and leave Kiganjo/Kiamwangi/220A to them. As authorities to support this contention counsel cites a passage from Eugete contra's The Restatement of African Law: 2 – Kenya II: The Law of Succession, by, London, Sweet & Maxwell, 1959, at page 15, which reads:-

“When a man dies, the portion that any son may have received on marriage courts as part of his share, provided that the deceased had expressed no wish to the contrary. Thus if a man had ten acres of land which he gives three acres to the elder of his two sons on marriage, when he dies his elder son receives a further two acres while the other five acres go to the younger son; ie the seven acres remaining in the man's possession on his death are not equally divided between the two sons, since the elder had already received part of his share on marriage.”

9. Counsel also cites *Section 42* of the Law of Succession Act to support the contention that although Kiganjo/Kiamwangi/220B had been distributed *inter vivos* and registered in the name of the respondent's husband, the same ought to be brought into the hotch potch and taken into account during the distribution of the deceased person's remaining intestate estate. *Section 42* provides:-

“Where-

(a) An intestate has, during his lifetime or by will, paid given or settled any property to or for the benefit of a child, grand child or house; or

(b)...

That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grand child or house.”

10. The respondent's position as stated in her written submissions is that she fully agrees with the findings and judgment of the primary court, and urges me not to interfere with those findings and judgment.

11. The oral submissions by counsel on 15th May 2013 largely minored the written submissions filed earlier.

12. The deceased person, Kweya Kagira died in 1966, well before the Law of Succession Act came into force on 1st July 1981. By virtue of *Section 2* of the Law of Succession Act the substantive law that should apply to his intestate estate ought to be written laws and customs that were applying at the date of his death, although the administration of his estate should be governed by the provisions of the law of succession should it be commenced after the 1st of July of 1981. The relevant provisions of *Section 2* of the Act state as follows:-

“2(1). Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of 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.”

13. The effect of *Section 2(1)* of the Law of Succession Act is to oust the application of all the Laws that governed succession to estates of deceased persons in Kenya prior to 1st July 1981, and to apply to the Law of Succession Act to the estate of such persons dying after that date. *Section 2(2)* on the other hand clarifies that the sub statement provisions of the Law of Succession Act would only apply to estate of persons dying after the 1st of July 1981 otherwise the laws obtaining prior to that date apply to estates of persons who died before the 1st of July 1981.

13. As the deceased died before 1st July 1981, *Section 2(2)* of the Act applies. The law to govern the intestate estate of the deceased is not Part V of the Law of Succession Act, which covers intestacy, but Kikuyu customary law which governed the subject before 1st July 1981 where the deceased was a Kikuyu as is the case here. That being so, *Section 42* of the Law of Succession Act is of no application in the mistrust case, given that *Section 42* is part V of the Act.

14. However, the position stated in the extract from constrain’s *Restate anit* would be of application. That position however would only apply if there is evidence that Kiganjo/Kiamwangi/220B was property originated belonging to the deceased and that the same was given to the respondent’s husband upon his marriage. I have carefully gone through the evidence recorded by the primary court. I find no evidence that Kiganjo/Kiamwangi/220B was originally property belonging to the deceased, neither is there evidence that it was given to the respondent’s husband upon his marriage.

15. The recorded evidence discloses that the deceased died possessed of only one asset – Kiganjo/Kiamwangi/220A. The Court of Appeal in *Kanyi –vs- Muthioria* (1984) KLR 712 said that under Kikuyu customary law where a polygamist dies intestate his land shall be divided equally by the houses. It was emphasized that the houses never die when there are heirs to the houses, and it is irrelevant whether the issues are alive or not. As a man with two wives and therefore two households, the estate of the deceased ought to be divided with two equal shares, one share to go to the house of Wamaitha and the other to the house of Wamure. Going by this arrangement the division ordered by the primary court favoured the appellants. They should not be complaining. Ideally they ought to cede serve land to the respondent, but the respondent is not complaining.

16. In view of everything that I have said above, I am of the impression that the appeal herein is not merited. I will therefore dismiss it and award costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE