**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**P & A. APPEAL NO. 2B OF 2010**

**SUSAN NJERI NGUNJIRI.....APPELLANT**

**versus**

**BETH WANJIKU NGUNJIRI.....RESPONDENT**

*(Appeal arising from the judgment of M.W. Mutuku Senior Resident*

*Magistrate Kigumo in Succession Cause No. 42 of 2007)*

**JUDGMENT**

1. The Respondent BETH WANJIKU NGUNJIRI and the Appellant SUSAN NJERI NGUNJIRI applied for grant of letters of administration in respect of the estate of NGUNJIRI KAGENI MUTURI in SRMC NO. 42 of 2007 KIGUMO and named the only known asset as LR LAND PARCEL No. LOC.2/KANGARI/2029 valued at Ksh. 400,000/-.
2. On 22nd December 2008 the Appellant took out summons for confirmation of grant and named the following Dependants.
3. a) Beth Wanjiku Ngunjiri - 1st wife.
4. b) Susan Njeri Ngunjiri - 2nd wife.
5. c) Francis Muturi Ngunjiri - son.
6. d) John Methu Ngunjiri - son.
7. e) Isaac Irungu Ngunjiri - son.
8. The appellant proposed that land parcel No. LOC.2/KANGARI/2029 be shared equally to both the appellant and the respondent as the widows of the deceased.
9. The respondent filed grounds of objection on the basis that the application was filed without her consent and that of the other beneficiaries and proposes that the family members should agree on the mode of distribution.
10. Directions were on 15th January 2009 given that the objection proceed for hearing by way of viva voce evidence.
11. At the hearing of this protest it was the respondent case that she had three children while the appellant had no children and that she was residing in 2½ acres of land bought by herself. She proposes that the suit land be inherited in the following manner.

12.1. Appellant - 1 acre

13.2. Respondent – 3 acres because she had children.

14. It was the evidence of P.W.3 EDWARD KARIUKI that the suit property should be divided in five equal portions amongst the five beneficiaries while Grace Mukuhi testified that the Respondent stayed in Rift valley and have settled in the suit land since she was married while Francis Muturi Ngunjiri testified that the appellant wanted to sell the suit land and proposed that the house with more children should get more land.
15. The appellant case was that the land should be subdivided into two equal portions since the

respondent already had land in Rift Valley.

16. Based upon the said evidence the trial magistrate held that the land ought to be subdivided into two equal parts between the houses of Beth Wanjiku Ngunjiri and Susan Njeri Ngunjiri
17. Being aggrieved by the said judgment the appellant filed the appeal and raised the following ground of appeal.

1. ***The learned Senior Resident Magistrate erred in law in distributing immovable properties of the deceased among the houses of the deceased.***
1. ***The learned Senior Resident Magistrate erred in law and fact in failing to find that the immovable property of the deceased comprising of land parcel No. LOC.2/KANGARI/2029 should have been shared between the surviving children of the deceased and not the houses as provided for by Law of Succession Act.***
2.
1. ***The learned Senior Resident Magistrate erred in law by hearing a cause whose value property exceeded KSh. 100,000/- contrary to section 47 and 48 of the Law of Succession Act Chapter 160 Laws of Kenya.***
2.
1. The appellant therefore prayed that the judgment of the lower court be set aside and an order made distributing the estate of the deceased amongst the widows.
2. Directions were given that this appeal proceed by way of written submissions which have now been filed.
3.
4. **SUBMISSIONS**
5. On behalf of the appellant it was submitted that the honourable magistrate did not have jurisdiction to determine the matter before her since the orders of the subject matter exceed Ksh. 100,000/- allowed under section 49 of Succession Acts and on that basis asked the court to allow the appeal.
6. It was further submitted that under section 40 of the Law of Succession the suit property should have been subdivided among the houses according to the number of children in that house it was therefore submitted that the trial court should have divided the asset into five (5) units and not two. In support thereof the case of RONO v RONO & ANOTHER(2008)IRLR 803 was submitted.
7. It was further submitted that whereas after the judgment appealed against subdivision and issuance of title was done this court has power to revoke title issued after distribution and the case of GITUANJA v GITUANJA KLR(E&L)1 on page 37 and POWER TECHNIQUES LTD V AG (2012) eKLR was relied upon.
8. On behalf of the Respondent it was submitted that from the evidence tendered the appellant admitted that she was the second wife of the deceased and that she reside in Kinangop where the deceased used to work and that is where the deceased was buried and that it might have been the wish of the deceased that one house lives in Murang'a while the other in Rift Valley and that the Rift Valley land was gift inter vivos within the meaning of section 42(a) of the Law of Succession Act.
9. It was therefore submitted that the judgment appealed against was just and fair within the meaning of Section 35(4)(g) and Rule 73. It was further submitted that the petition was filed by both the appellant and the respondent without raising the issue of want of jurisdiction and therefore substantive justice gives the court jurisdiction.
10. From the pleadings and submissions herein I have identified the following issues for determination:

    ***a) Did the trial court have jurisdiction and if it did not is this fatal to the order made.***

    ***b) Was the trial court just and fair in allowing the property to be shared between the two houses?***

1. As submitted by the appellant the trial court did not have jurisdiction since the value of the property as stated was Ksh. 400,000/- but since the parties herein all participated in the trial without raising the issue and being alive to the fact that jurisdiction can not be given by consent I

am of the considered view that under Article 159 of the Constitution is applicable to this matter and that in the interest of substantive justice to find that want of pecuniary jurisdiction is not fatal to this matter.

2. It must be pointed out that in the present Kenya the value of property lower than Ksh. 100,000/- is none existence and it is high time the Legislature amend Succession Act so as to be in line with reality. I therefore find no prejudice suffered by any party through the judgment herein and therefore find no merit on the ground of appeal in respect of jurisdiction.
3. The only issue for determination now is whether the estate should have been distributed into five units or amongst the two houses. This being a first appeal the court is entitled to reevaluate the evidence tendered before the trial court which I have done here above but must point out that there was one fundamental evidence before the trial court and that being appellant lived with the deceased throughout in the Rift Valley and that the deceased is buried at the piece of land in the Rift Valley.
4. There was no evidence tendered by the appellant before the trial court to confirm that the land was purchased by her self as it was evidence that the land was either given to the husband or he purchased the same when they were removed from the forest where he used to live and work. I would therefore agree with the submissions by the respondent that it ought to have been taken into account as gift inter vivos to the appellant.
5. Having therefore come to the conclusion that the appellant and her household had been provided for during the life time of the deceased and noting that our Constitution does not allow any form of discrimination and states that spouse are equal at the time of marriage, during and after and have taking into account section 27 of the Law of succession Act I find no fault with the trial courts judgment herein the fact that the respondent did not have children not withstanding.
6. In this I find support in the judgment of OMOLO JA IN RONO V RONO at page 813 when the judge had this to say:
7. ***"My understanding of that section (section 40(1)) is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children. If Parliament had intended that there must be equality between houses there would have been no need to provide in the section that the number of children in each house be taken into account.***
8. ***Nor do I see any provision in the Act that each child must receive the same or equal portion."***
9. I therefore find no merit in the appeal herein and dismiss the same with cost to the Respondent.

J. WAKIAGA

JUDGE

No appearance by Advocates for the parties.

Francis - present

Court Judgment read in open court:

J. WAKIAGA

JUDGE

27/2/2014