REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Probate & Administration 1 of 2007

IN THE MATTER OF THE ESTATE OF MUGO MUTHANGA – DCD

NJUHA MUGO.....1ST APPELLANT

TERESA WANJIKU NGANGA.....2ND APPELLANT

Versus

TABITHA WAIRIMU MUTHANGA.....RESPONDENT

(An appeal from the judgment and decree of the Senior Resident Magistrate's Court at Kangema in Succession Cause No.27 of 2000 dated 5th April, 2007 by P. NGARE (Ag. SRM))

J U D G M E N T

On 6th September, 1970, Mugo Muthanga hereinafter referred to as *"the deceased"* passed on. It follows therefore that his estate does not fall for administration under the Law of Succession Act which came into force on 1st July, 1981 despite its enactment by parliament in 1972. His estate is therefore subject to his customary law although the administration of the same is undertaken under the Act.

The deceased had one wife and two sons. The first son, Muthanga Mugo passed on sometimes in 1954. Infact he predeceased his father. Before he passed on as aforesaid he had two wives, Tabitha Wairimu Muthanga, the 1st respondent and Teresa Wanjiku Nganga, 2nd appellant. The other son was Njuha Mugo, the 1st appellant.

On 3rd March, 2000, the 1st appellant petitioned for the grant of letters of administration intestate with himself as a sole administrator in the Senior Resident Magistrates court at Kangema. He indicted in the petition that the deceased had been survived by the three that is the two appellants, and the respondent. However, the respondent filed a caveat in the cause. On 28th June, 2000, the 1st appellant and respondent were appointed by court as joint administrators of the estate of the deceased.

Subsequent thereto, the 1st appellant filed an application for confirmation of grant in which he proposed that land parcel Loc.19 Gacharageini/717 measuring about 7.7 acres and hereinafter referred to as *"the suit premises"* be shared as follows:

1) Himself - 4.7 acres

2) 2nd appellant – 1.5 acres

3) Respondent – 1.5 acres

In deciding so the 1st appellant acknowledged the fact that the 2nd appellant and respondent were widows of his late brother. The 2nd appellant was happy with the scheme of distribution proposed by the 1st appellant. However that was not the case with the respondent. She filed a protest. She claimed that the entire estate should be shared between herself and the 1st appellant equally on the grounds that though the 2nd appellant had been her co-wife, she left the matrimonial home after the passing on of their late husband way back in 1958. She went to live and indeed settled with her parents in Kingangop with her children. She had never returned to the matrimonial home since then. Accordingly she had severed any links she had with the deceased's family and she could therefore not inherit his estate. She had actually been away for a period in excess of 50 years.

Both the application for confirmation of grant and protest proceeded to trial. The learned magistrate having carefully considered and evaluated the evidence tendered by the parties and their counsel's written submissions reached a verdict thus;

"Applying these facts to the present case it is my finding that the petitioner is not the eldest son to the deceased. That his deceased brother the husband to the protestor was ideally the petitioner is not entitled to any advantage over the protestor. After all the protestor has demonstrated that she assisted his parents in law till the time when they went to meet with their maker.

I consequently hold that the two parties herein i.e the petitioner and the protestor stand on the same pedestal when it comes to this sub-division of the deceased land. Were it not for the protestor's husband's demise, the petitioners would had received a smaller portion of the deceased estate if we are to apply the Kikuyu customs strictly.

In the upshot I dismiss the petitioner's application for confirmation of grant herein and grant the protestors proof (sic). I order that the deceased estate being land parcel Lo.19/Gacharageini/717 be distributed equally between the petitioner Njuha Mugo and the protestor Tabitha Warimu Muthanga so that each of them gets 3.85 acres. Each party to bear its costs."

The appellants were aggrieved by that decision and hence filed this appeal through messrs S.N. Ngare & company advocates. He advanced 9 grounds of appeal in his memorandum of appeal. However as correctly pointed out by Mr. Ngare in his written submissions in support of the appeal the said ground can be broadly narrowed down to two;
"1. Whether the 2nd appellant and the respondent have locus standi to inherit the deceased's only property being parcel No.19/Gacharageini measuring approximately 7.7 acres.

2. In any even what is the appropriate mode of distribution of the deceased's estate…"

When the appeal came up for hearing on 5th October, 2009, parties through their respective counsel agreed to canvass the same by way of written submissions. The same were subsequently filed and exchanged. I have carefully read and considered them.

On the issue of Locus standi, I cannot fault the reasoning of the learned magistrate I have no doubt at all in mind that under Kikuyu customary law a widow is entitled to inherit what rightly belongs to her husband. Yes, there has never been a declaration of presumption of death of 2nd appellant's and respondent's husband under section 118A of the Evidence Act nor did they apply for a grant of letters of administration with regard to his estate. Ordinarily therefore none of them has locus standi to claim any legal right over the estate of their late husband. That would have been the case, if the 1st appellant and respondent initiated the proceedings. However the proceedings were commenced by the 1st appellant who then dragged the 1st appellant and respondent into it, the same people he now wishes that they should not be heard in the matter for want of locus standi. The 1st appellant first mentioned the 2nd appellant and respondent's name in the affidavit in support of the petition for letters of administration intestate. In his summons for confirmation of grant, he proposed the manner of distribution of the estate and included them therein. There is no doubt therefore that 1st appellant recognized the interest of the 2nd appellant and respondent in the estate of the deceased. His conduct in the entire proceedings is clear, he wished the estate to be shared between himself on one hand and the 2nd appellant and respondent on the other. As correctly submitted by Mr. Wachira, learned counsel for the respondent, the 1st appellant cannot now turn around and claim that these two have no locus standi in these proceedings. He is the one who brought them in, he is therefore estopped from raising the issue. Clearly the 1st appellant is clinging on this issue merely because the judgment of the subordinate court did not go his way. Had the judgment gone the way he had proposed in the application for conformation of grant I am sure he would have been happy and quite satisfied notwithstanding that there had been no declaration of presumption of death and or grant of letters of administration of the 2nd appellant and respondent husband's death. In any event parties can only urge on appeal issues that were raised and rule on during the trial. They cannot on appeal raise and canvass issues that were before the trial court. This issue was never raised by the appellants during the trial. These are enough reasons to dispose off the first broad grounds of appeal.

So how should estate of the deceased be distributed? The learned magistrate was of the view that the same should be distributed equally between the 1st appellant and the respondent to the exclusion of the 2nd appellant. He gave reasons why he came to that conclusion which I find cogent. It is common ground that the 2nd appellant left the matrimonial home upon death of their husband in or about 1954 and never came back. So for 50 plus years, the 2nd appellant had no contact whatsoever with her late husband's family. She went away with all her children and relocated to Kinangop where she was given land by her father. It is also instructive that when the deceased passed on, she did not even bother to attend his burial. This being the scenario, can the 2nd appellant really claim that she was still a widow of her deceased husband? I do not think so. In the cotran's book, Restatement of African law, he makes this poignant statement at page 22.
"….A widow whose husband has died may sever her relations with the deceased husband's family by returning to her father. Such as act would be construed exactly the same way as a divorce…."

It appears that this is what happened in the circumstances of this case. If her father was opposed to her coming home, he would have send her back to her matrimonial home. Instead her father accepted her back and gave her a place to reside. The 2nd appellant claims that she was still a widow because Ngurario ceremony was conducted in 1969. One may ask how could this have been possible when the 2nd appellant had already deserted the matrimonial home and her husband was long dead? Failure by her father to return the 2nd appellant to her matrimonial home coupled with her long stay away from the matrimonial home in excess of 50 years and coupled further with her father giving her a place of abode with her entire

family was and is enough evidence of severance of family ties. It matters not therefore that no dowry was returned. It was upto her father to send her back to her husband's family with two elders to commence the process of refunding dowry. As correctly submitted by the respondent nobody could have pursued her from her husband's side as he was dead.

In view of the foregoing, I hold and determine just like the learned magistrate did that the 2nd appellant cannot be deemed to be a widow of Muthanga Mugo.

The estate then should be shared equally between the 1st appellant and the respondent. It is not lost on me that the 1st appellant wants a bigger share allegedly because he assisted the deceased to buy the same. In response it was also shown that husband of the 2nd appellant and respondent also used to work and he too contributed towards the purchase of the suit premises. There is no cogent evidence to support the 1st appellant's contention that he contributed towards the purchase of the suit premises. I may say the same of the 2nd appellant and respondent's husband. Accordingly I hold and find that the entire suit premises belonged Mugo Muthanga and the same should be shared equally between the 1st appellant and the respondent.

In the upshot I find no merit in this appeal and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA

JUDGE