REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 24 of 2003

DEDAN NDIRANGU MAINA…….....……1ST APPELLANT

JONAH KANJA MAINA…….....…….2ND APPELLANT

VERSUS

RUTH WANJIKU MAINA……...….....……1ST RESPONDENT

DAVID NDEGWA MAINA…….....……..2ND RESPONDENT

JUDGMENT

Dishon Maina Kimani (*hereinafter referred to as the deceased*) died on the 4th of October 1997. On the 7th of June 2001, Ruth Wanjiku and David Ndegwa Maina (*hereinafter referred to as the petitioners*) applied to be granted letters of administration to administer the estate of the deceased at the Principal Magistrate's Court, Nyahururu. In the said application, the petitioners listed the widow of the deceased and his eleven sons as the deceased beneficiaries. The only property that comprised the deceased's estate was listed as parcel number Nyandarua/Kitiri/206 measuring 9.3 ha. From the pleadings filed in court, the deceased had married two wives. His first wife predeceased him. The first wife was survived by four sons namely Paul Kimani Maina, Jonah Kanja Maina, Dedan Ndirangu Maina and John Kamau Maina. The second wife Ruth Wanjiku Maina (*one of the petitioners herein*) was blessed with seven sons namely Michael Kimani Maina, David Ndegwa Maina, Stephen Ndirangu Maina, Samson Kamau Maina, Francis Mwangi Maina and James Wamiti Maina. The petitioners were issued with a grant of letters of administration intestate on the 31st of August 2001. When the petitioners sought to confirm the said letters of administration issued to them, Dedan Ndirangu Maina and Jonah Kanja Maina (*hereinafter referred to as the objectors*) objected to the said letters of administration being confirmed to the petitioners on the grounds that the proposed subdivision of the deceased's estate was unfair to the children of the first wife.

The subordinate court heard the objection proceedings and by its judgment delivered on the 21st of January 2003 dismissed the objection by the objectors. In the said judgment, the trial magistrate upheld a will which was allegedly written by the deceased and approved by all the children of the deceased. The said will had distributed the only property among the beneficiaries of the deceased estate by having each son inherit one acre of land. The surviving widow however was to inherit eleven acres (i.e. half of the property) of the said estate. The objectors were aggrieved by the decision of the trial magistrate and appealed to this court.

In their memorandum of appeal, the objectors raised nine grounds of appeal which may be summarized as hereunder; they were aggrieved that the trial magistrate had failed to appreciate the applicable Kikuyu customary law when distributing the estate of the deceased. They were aggrieved that the trial magistrate had failed to consider the evidence adduced in court and further had considered extraneous factors in arriving at the said decision in favour of the petitioners. They faulted the trial magistrate for hearing the succession proceedings and failing to put into consideration the fact that the value of the estate exceeded Kshs 2 million which was beyond the jurisdiction of the said court. They faulted the trial magistrate for finding that the document which was produced in evidence by the petitioners purportedly as the will of the deceased, was not a will within the meaning of the law. They were finally aggrieved that the trial magistrate had unfairly distributed the estate of the deceased.

At the hearing of the appeal, Mr. Kahuthu learned counsel for the objectors reiterated the contents of the memorandum of appeal. He submitted that the document which was produced as a will by the petitioners was not a will as contemplated by the law. He took issue with the fact that the petitioners had applied to be granted letters of administration intestate to the estate of the deceased, yet during the confirmation of grant they purported to produce a will which was allegedly written by the deceased. He was of the view that the procedure which ought to have been adopted was for the petitioners to apply to be issued with a grant of probate. He submitted that the purported will should be disregarded by this court and instead the estate of the deceased should be distributed in accordance with **Sections 32, 33 and 34 of the Law of Succession Act**. He submitted that this court ought to consider applying the Kikuyu customary law by distributing the estate of the deceased between the children of the two wives. He argued that the trial magistrate did not have the requisite jurisdiction to hear and determine the succession proceedings because the value of the estate of the deceased was more than Kshs 100,000/=.

In his view, the succession cause ought to have been filed in the High Court. He finally submitted that this court should therefore distribute the deceased's estate under the Kikuyu customary law by distributing the said estate between the two houses who are the beneficiaries of the deceased. He submitted that the document which was relied on by the trial magistrate to arrive at the said distribution of the deceased's estate was a scheme by the petitioners which would enable them disinherit the members of the family of the first wife of the deceased. He urged this court to allow the appeal.

Miss Njoroge, learned counsel for the petitioners opposed the appeal. She submitted that this court should ignore the submissions made by the objectors on the issue of jurisdiction because the objectors participated in the proceedings before the subordinate court without raising the issue of jurisdiction. She submitted that the reason why the objectors were dissatisfied with the distribution of the estate of the deceased by the trial magistrate, was because the trial magistrate had upheld a document which had been signed by the deceased and approved by all the sons of the deceased whereby the surviving widow of the deceased was given eleven acres of the property that comprised the deceased's estate to occupy for life. She submitted that the Kikuyu customary law could not be applied in the distribution of the deceased's estate because the parcel of land that comprised the deceased's estate was agricultural land and therefore not subject to customary law.

She further submitted that the document which was relied on by the trial magistrate to arrive at his decision was not a will but was a document which clearly showed the intention of the deceased on how he wanted his estate to be distributed. She submitted that the trial magistrate had not erred in arriving at the said decision distributing the deceased's estate because he had taken into account the fact that the deceased had been married to two wives and each son was considered and given land in equal proportion. She further submitted that no miscarriage of justice was occasioned by the trial magistrate. She therefore submitted that this court should not disturb the finding of the trial magistrate. She urged this court to dismiss the appeal.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence that was adduced before the trial magistrate's court so as to reach its independent determination whether or not to uphold the decision of the trial magistrate. As was held by Sir Clement De Lestang, VP in **Selle & Anor –vs- Associated Motor Boat Company Limited & Others [1968] EA 123** at page 126;

"***An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholani (1955) 22 EACA 270)."***

In this appeal, the issues for determination by this court are three fold; firstly whether the subordinate court had jurisdiction to hear and determine the succession dispute in respect of which this appeal arose. The second issue for determination is whether the petitioners made a proper application to be granted letters of administration to the deceased's estate and the third issue for determination is whether the estate of the deceased was fairly distributed among the beneficiaries of the deceased.

On the first issue **Section 48 of the Law of Succession Act** provides that a resident magistrate's court shall have jurisdiction to entertain an application for the grant of letters of administration to a deceased's estate provided the said estate shall not be of a gross value of more than Kshs 100,000/=. In this appeal, the estate of the deceased is a twenty three acre piece of land in Nyandarua District. The said parcel of land cannot therefore be said to be worth less than one hundred thousand. It is clear therefore that the trial magistrate did not have jurisdiction to hear and determine the succession dispute before him. The petitioners ought to have filed the petition to be granted letters of administration to the deceased's estate at the High court. However in view of the time that the proceedings have taken, I will decide this appeal on merits notwithstanding my finding that the subordinate court lacked the requisite jurisdiction in the first place to have heard the succession dispute. Substantial justice requires that this court invokes its inherent jurisdiction to do justice to the parties to this appeal even though the judgment of subordinate court on the face of it appears to be illegal due to lack of jurisdiction on the part of the said court.

The second point for determination is on the procedure which was adopted by the petitioners in filing the petition before the subordinate court. The objectors have taken issue with the fact that the petitioners filed the petition to be granted letters of administration intestate but later sought to rely on a document which they claimed was a will written by the deceased. I have carefully perused the said document. I agree with the submissions by Miss Njoroge learned counsel for the petitioners that the said document could not by an stretch of imagination be referred to as a will, rather it was an indication by the deceased on how he wished his estate to be distributed upon his death. The deceased sought the agreement of all his sons who signed the said document indicating that they were in agreement with the proposals made by the deceased. I therefore hold that the procedure which the petitioners adopted to obtain the letters of administration to the deceased's estate was proper because the said document was not a will as defined by **Section 11 of the Law of Succession Act.**

I however noted that the objectors filed objection to the issuance of letters of administration after the petitioners had been granted the said letters of administration. Objection proceedings can only take place in a subordinate court before the issuance of a grant of letters of administration (*see* **Sections 68 & 69 of the Law of Succession Act**). Once letters of administration has been granted to a petitioner, any person who is aggrieved by the decision of the court in granting the said letters of administration, can only apply to the High court for the revocation or annulment of the grant of letters of administration under the provisions of **Section 76 of the Law of Succession Act**.

In the instant appeal, the objectors ought to have filed a Miscellaneous Application in the High court to have the said letters of administration granted to the petitioners revoked or annulled (*see* **Section 48(1) of the Law of Succession Act**). The objectors therefore abused the procedure as provided by the **Law of Succession Act**. No matter. The parties are now before a court of competent jurisdiction and as stated earlier in this judgment, this court shall determine the issues before it on its merits and shall not be hampered by the abuse of procedure on the part of both the petitioners and the objectors.

The subordinate court, after considering the evidence that was adduced, adopted the mode of distribution proposed by the petitioners to distribute the deceased's estate. In the said distribution, all the sons of the deceased, (*born of the first wife and the second wife*) were considered each as a unit and inherited one acre each from the parcel of land that comprised the deceased's estate. Only one son, Samson Kamau Maina, inherited one and a half acres. The surviving widow of the deceased, (*the second wife*) however inherited eleven acres of land. The sons of the first wife (*the objectors in this case*) were aggrieved by the said decision of the trial magistrate and filed the present appeal.

Having carefully re-evaluated the evidence adduced and the submissions made before me, I am of the opinion that the complaint by the objectors is legitimate. The said distribution was skewed to favour the family of the second wife to the exclusion of the family of the first wife. The finding by the trial magistrate that the said parcel of land which was distributed to the surviving widow of the deceased could be distributed to all the sons of the deceased after her death missed the point. The real point in issue is that under **Section 40(1) of the Law of Succession Act,** in a polygamous family each wife and each child shall be considered as a unit when distributing the deceased's estate. In this appeal, it is clear that the surviving widow of the deceased was considered as eleven units instead of the one unit as provided for by **Section 40(1) of the Law of Succession Act**. In the premises therefore, I find merit with the appeal filed by the objectors herein. I will set aside the distribution of the deceased's estate by the trial magistrate and distribute the estate of the deceased in accordance with the law.

In that regard, I will consider the eleven sons and the surviving widow of the deceased as single units. Since the deceased had indicated his desire to distribute the estate of the deceased equally among his sons, I therefore distribute the property that comprised the deceased's estate equally among the eleven sons and the surviving widow of the deceased. The property that comprise the estate of the deceased i.e. Nyandarua/Kitiri/206 measures 9.3 ha i.e. approximately twenty three acres. I shall distribute the said twenty three acres among the twelve beneficiaries of the deceased's estate. Each beneficiary shall therefore inherit 1.9 acres.

Since this is a dispute involving family members there shall be no orders as to costs.

DATED at NAKURU this 19th day of June 2006.

L. KIMARU

JUDGE