



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Philip Thiomgo Nganga - Deceased (Civil Appeal
54 of 2022) [2024] KEHC 12024 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 54 OF 2022
RPV WENDOH, J
OCTOBER 3, 2024**

IN THE MATTER OF THE ESTATE OF PHILIPH THIONGO NGANGA – DECEASED

BETWEEN

TABITHA GATI CHACHA APPELLANT

AND

MARIA MUSEMBI KAKULA RESPONDENT

JUDGMENT

1 This matter relates to the estate of Philip Thiomgo Nganga (deceased) who died intestate on 4/1/2017. The deceased had two wives, Maria Musembi Kakula (1st wife) and Tabitha Gati Chacha (2nd wife). By a judgment dated 13/04/2022 Hon. Munguti, SPM distributed the deceased's estate as follows:-

“Maria Musembi Kakula

1. Ndundori/Lanet/Block 5/1576 wholly
2. Bugumbe/ Maberu 1377 1 hectare and blue gum trees standing on the 1 hectare. This allocation is based on the fact that Tabitha Gati Chacha had disposed of motor vehicle and motor cycle without sharing the proceeds with Maria Musembi Kakula.
3. 60% of all the money held in the following accounts
 - a. Equity account no. 1160196409413,0130100238644
 - b. Migori Kilimo Self Help Group
 - c. Money held at Ukulima Sacco
 - d. Gratuity from Ministry of Agriculture
 - e. Monies held at Union of Kenya Civil Servants (Maria Musembi Kakula is to get 60%.



Tabitha Gati Chacha she will get

1. 40% of Bugumbe/Mabera 1377 of 0.6 hectares
2. The whole of Mabera plot measuring 50” 100 plus the structure standing on it.
3. Motor vehicle reg. no. KAT 026K (though already sold)
4. Motorbike Registration No. KCWV 658V
5. All the blue gum trees standing on 40% of her share in Bugembe/Mabera 1377
6. 40% of all the money held in the following accounts
 - a. Equity account no. 1160196409413, 0130100238644
 - b. Migori Kilimo Self-Help Group
 - c. Money held at Ukulima Sacco
 - d. Gratuity from the Ministry of Agriculture
 - e. Monies held at Union of Kenya Civil Servants.

2 The second wife, Tabitha Gati, is dissatisfied with the said Judgment and filed the present appeal. The appellant cited nine grounds of appeal which can be condensed into the following;

1. The court erred in entering judgment against the appellant in favour of the respondent when the Respondent’s objection had been dismissed and no application made to reinstate it;
2. That the Respondent failed to provide any records in respect of the property at Nakuru and Solai and Lanet;
3. That the court erred in failing to distribute the estate equally between the two wives.
4. That the court failed to consider that the property in Mabera was purchased by the appellant without any contribution from the Respondent.
5. That the court erred in its Judgment by considering extraneous evidence and delivering a judgment that was against the evidence.

The appeal was canvassed through written submissions.

3 It was the appellant’s submission that the trial court erred in going on to distribute the deceased’s estate because S. Ouko (RM), the Magistrate who had dealt with the matter earlier, by her Ruling of 6/12/2019, held that the Estate be distributed equally between the two wives of the deceased; that each be entitled to an equal share of the title; But that when Mr. Munguti took over, he directed that each party file a list of properties, proposed distribution and statement of accounts; that they filed their respective lists following which the magistrate rendered his Judgment of 3/04/2022 which is now challenged. It is the appellant’s contention that the Resident Magistrate RM Ouko had dismissed the objection to the Respondent’s objection and no application was made to set it aside; that after the dismissal, the appellant was issued with grant of Letters of Administration;

4 The appellant also sub submitted that the court awarded the motor vehicle KAT 020K and Motorcycle KCWU658U to her yet it was not ascertained that the said vehicles existed or that the appellant actually sold them.



- 5 As regards LR Bugumbe/Mabera/1377, the appellant contends that it was the subject of litigation in ELC.E020/2020 where an order was made that a portion be transferred to one James Mutatiro Chacha and that the same was not therefore available for distribution. It was further submitted by the appellant that the Respondent did not disclose all the deceased's property and especially, as relates to the Solai and Lanet and that the court should have found that the said property was registered in the deceased's names. The appellant also submitted that the Ouko RM having made an order on distribution, is evidence that she complied with Section 40 of the Laws of Succession Act, and the trial Magistrate had no jurisdiction to arrive at a different finding. It was also her submission that the court overlooked the fact that she solely purchased the Bugumbe/Mabera/1377 land.
- 6 In her submission, the Respondent submitted that as regards Solai land, she had explained in her affidavit of 18 /06/2021 that it belonged to the deceased's parents; that the request by the appellant to have the Estate distributed equally is not tenable because the Respondent only married the deceased in 2015 whereas the appellant had been married to the deceased for over thirty (30) years and that the court was very generous in awarding the Respondent 40% of the estate; that the appellant's contribution to the estate was minimal and she should have been awarded 10%, that the Respondent was very fair in her proposal on distribution by offering the Bugumba/Mabera plot to the appellant's yet the appellants proposal was unfair and malicious.
- 7 The respondent also submitted that after the deceased's death the appellant sold the vehicle and motorcycle and withdrew Kes.657,000/= from the deceased's Equity account; that the appellant has been deceitful in filing the succession proceedings and even forging the children's signatures; That the logbooks and title deeds were in the deceased's possession at the time of his death and the deceased was residing with the appellants at the time. The Respondent denied that the objection proceedings filed by the Respondent were dismissed but were allowed and that the grant of Letters of Administration were never given to the appellant.
- 8 As to allegations that Bugumbe /Mabera/1277 was transferred to a 3rd party, is untrue and there is no evidence to that effect. It was merged that the appeal totally lacks merit and should be dismissed.
- 9 I have duly considered the grounds of appeal, the submissions of Counsel together with all the proceedings and pleadings.
- 10 It is true that the appellant petitioned the court for letters of administration alone while she was aware that the deceased had a first wife. When the Respondent became aware of it, she filed objection proceedings dated 16/4/2018 which the court (under RM) considered and rendered her Ruling. The court wishes to note that there is a mistake in the date of the Ruling and it is the date that the parties have been referring to. The ruling was actually delivered on 6/2/2019. It cannot have been rendered on 6/2/2018 yet the application to which it relates was filed on 16/4/2018. That anomaly in the date of the ruling is hereby corrected. Towards the end of the Ruling, the court recorded thus "Therefore, the deceased estate should be distributed equally between the two houses of each wife by each being entitled to an equal share of the assets. In the upshot, the court makes the following orders."
- 11 The court went ahead to make the following orders.
1. That the objection dated 10/4/2018 is allowed.
 2. That the two parties apply for Grant of letters of administration as co-administrators in the Estate of Philip Thiongo Nganga -deceased.
 3. That this being a family matter there shall be no order as to costs."



12 I have perused the court record and again on 3/4/2019 when the court ruled on the application dated 26/3/2019, the court said.

I have perused the application dated 26/3/2019 and the respondent reply thereto. I have also carefully considered the submission of both parties before this court on 3/4/2019. I refer to my earlier ruling on the matter delivered on 6/2/2019. In regards to my determination then and the stalemate that has seemingly been reached, I hereby order that letters of administration be confirmed in the names of the applicant and the respondent. Both parties to file the mode of distribution in the next 14 days.

13 From the above excerpt from Ouko RM's observation; First, the court allowed the Respondent's objection and allowed her be recognized as the deceased's first wife; Secondly, that the appellant and respondent be appointed as joint administrators of the estate, and thirdly, apply for confirmation with the irrespective proposals on distribution, the only mistake the Magistrate seemed to make is order confirmation before distribution is done. Distribution precedes confirmation of Grant. The appellant's contention that the objection by the Respondent was dismissed and that she was the only administrator is misplaced and untrue.

14 The next issue I wish to deal with is whether the land Bugumbe/Mabera/1377 belonged to the appellant and hence should not have formed part of the deceased's estate. By the appellant's application dated 11/3/2019 seeking confirmation of grant, at prayer 3 (d) thereof, she prayed that the deceased's two parcels of land Dundori/Lanet Block 5/1576 and Bugumbe/Mabera/1377 be distributed equally to both the appellant and respondent. To her affidavit in support of the same application at Paragraph 14, the appellant prayed that they be shared equally between the two wives and attached copies of the titles as TG6. The title for Bugumbe/Mabera 1377 was issued to the deceased on 11th February 2013 and registered in the name of the deceased alone. At that time when she swore the said affidavit, the appellant never alluded to having contributed to the purchase of the said land or that it was subject to any case nor did she claim to have purchased it. Besides, the appellant's evidence is that she married the deceased in 2015. She was not his wife in 2013 when the land was registered in deceased's name. If there was any pending case regarding the said land, the appellant would have brought it to the court's attention and entered the pleadings therein. It is trite law that each party is bound by their pleadings. The appellant cannot depart from her pleadings and she cannot purport to introduce new evidence in her appeal.

15 Whether the Solai land exists. Though the appellant now claims that the said land should have formed part of the deceased estate, she never alluded to the land forming part of the estate in her application for confirmation. When the issue of Solai land arose earlier when she was asked to provide documents of all the the property of deceased, the respondent in her affidavit dated 24/2/2020 explained that the said land was not in the deceased's names but that the deceased's parents had allowed them to reside thereon in a semi-permanent house which the parents demolished when they left the land. The appellant alleges that the said land belonged to deceased but has not provided any aorta of evidence in support of that allegation. I find that there is no evidence that the Solai land exists or formed part of deceased's estate.

16 The appellant testified to have married the deceased in 2015 and that is what her father and other witnesses testified to. Although claimed to have cohabited with deceased from 2010, there was no evidence to that effect. By 2017 when the deceased died, the Respondent and deceased had been married for two (2) years unlike the Respondent with whom they had been married since 1990, which was about twenty-seven (27) years. It means that nearly all the property i.e., the two pieces of land were acquired during the deceased's and respondent's marriage. The appellant was nowhere in the picture. I have looked at the list of the appellants children as per her testimony during the hearing of the



objection proceedings. They were born between 1983 and 2003 before she married the deceased. There is no evidence that any of the children belonged to the deceased. The appellant cannot claim to have contributed to the estate substantially. She has not demonstrated it through her evidence. She may have lived with the deceased when he is said to have been unwell and taken care of him, but claiming equal rights to the property is being greedy. In my view even the 40% of the estate offered to the appellant was excessive and undeserved.

- 17 In regards to the vehicle and motorcycle, in her further affidavit dated 25/2/2020, the appellant claimed that they were in her names and she sold them to pay fees for her children. Motor vehicles and even motorcycles do have log books. To rebut the respondent's, claim the appellant could have produced the copies of the log books or sale agreements. This court will agree with the trial court that they were part of the deceased's estate. The appellant had already intermeddled with the deceased's estate by selling the vehicle and motorcycle and these were properties added to the schedule of the deceased property that were available for distribution.
- 18 Having considered this appeal in its totality. It is my view that the appellant is driven by greed and wants to reap where she did not sow to the disadvantage of the true and rightful heirs to the deceased's estate. I would agree with the respondent's request that she was entitled to much less. The Respondent prayed that the court awards the appellant 10% but she did not file a cross-appeal. For that reason, I will not grant the said prayer.
- 19 In the end, I find the appeal is without merit and I will dismiss it. Because of the vexatious nature of this appeal, I order that the appellant pays the costs of this appeal.
- 20 It is so ordered.

DELIVERED, DATED, AND SIGNED AT KAPENGURIA THIS 3RD DAY OF OCTOBER, 2024.

R. WENDOH

JUDGE

Ruling delivered in the presence of

Appellant – Tabitha Gati – present

Respondent - absent

Juma/ Emma – Court Assistants

