



REPUBLIC OF KENYA



KENYA LAW
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**Rotich v Rotich & 3 others (Civil Appeal E041 of 2021)
[2023] KEHC 17955 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E041 OF 2021**

JK SERGON, J

MAY 16, 2023

BETWEEN

FREDRICK ROTICH APPELLANT

AND

ISAAC ROTICH 1ST RESPONDENT

RICHARD ROTICH 2ND RESPONDENT

MICHAEL ROTICH 3RD RESPONDENT

DOMNIC ROTICH 4TH RESPONDENT

*(Being an appeal against the ruling of HON. B.R. KIPYEGON (PM) in Kericho
C.M.C Succession Cause No. 173 of 2016 delivered on 4th March, 2020.)*

JUDGMENT

1. The appeal herein is against the ruling of the trial court (Hon. B. R. Kipyegon) in Kericho C.M.C Succession Cause No.173 of 2016 wherein the trial court upheld the Protestors' proposed mode of distribution wherein the court held that the estate of the deceased Chepkulul Arap Kelelyo (Deceased) be distributed as proposed by the Objectors that is each widow and their respective children do remain and/or distribute parcels on the basis of respective residences as before, in counties of Kericho, Bomet and Narok for 1st, 2nd and 3rd wife respectively.
2. The appellant being aggrieved preferred this appeal and put forward the following grounds:
 - i. That the learned trial magistrate erred in law by failing to adhere to the procedures and substantive provisions of the *Law of Succession Act* and proceeded on wrong principles of law thereby arriving at a wrong conclusion.



- ii. That the learned trial magistrate erred in law and fact in finding that the Appellant had not provided any mode of distribution and yet the mode of distribution was filed and was on record.
 - iii. That the learned trial magistrate erred in not sufficiently considering all the evidence presented before him in total and in particular the evidence presented to him by the Appellant.
3. The Appellant thus prayed that the appeal be allowed, the decision (ruling) and certificate of confirmation of grant issued by the Learned Magistrate be reversed and set aside and the Succession file be transmitted to be heard afresh. He also prayed that the cost of the appeal be borne by the Respondents.
 4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the Appellant filed their written Submissions dated 11th April, 2023. From the records it is clear that the Respondents did not participate in the appeal.
 5. In his submissions the appellant outlined the issues for determination as follows:
 - i. Whether or not the Learned Trial Magistrate failed to adhere to the procedures and substantive provisions of the *Law of Succession Act* and proceeded on wrong principles of law thereby arriving at a wrong conclusion.
 - ii. Whether or not the learned trial magistrate erred in law and fact in finding that the Appellants had not provided any mode of distribution.
 - iii. Whether or not the learned trial magistrate erred in not sufficiently considering all the evidence presented before him in total and in particular the evidence presented to him by the Appellant.
 - iv. Is the Appellant entitled to the orders sought?
 - v. Who bears the cost of the Appeal?
 6. On the first issue, the Appellant in citing Section 71 (2) of the *Law of Succession Act* as read together with rule 40(4) of the *Probate and Administration Rules* submitted that the legal requirement is specific in its objective to ensure that there is certainty in the distribution of the estate before the court confirms the grant and that in the instant case the Appellant proposed a mode of distribution and the court, having considered the letter of the Objectors who are respondents to this appeal, fell into error in going directly into a determination and that the same was pre-mature.
 7. It was his submission that a protest was not filed as required under rule 40(6) and (8) of the *Probate and Administration Rules* and that the Learned Magistrate fell into error in writing a ruling instead of directing the Objectors to do an affidavit of Protest in the prescribed form as well as filing and serving of their mode of distribution and not as done by the objector's advocate's in their letter dated 2nd May 2019.
 8. He contended that substantive justice required that the conflicting modes of distribution be subjected to hearing in accordance with rule 41(1) of the Probate and Administration Rules. He submitted that the learned magistrate acted summarily and, in a rush, to do a ruling which in essence failed to accord an opportunity to the Appellant to defend his mode of distribution where he proposed that all the properties be divided among the three widows of the deceased equally. That there was no interrogation on the veracity of the allegations contained in the Advocate's letter dated 2nd May 2019 where he



proposed on behalf of the Objectors, the Respondents in this appeal, that each widow remains where they were settled by the deceased.

9. He relied on the case of *In re Estate of Jonathan Kipruto Chemjor (Deceased)* [2020] eKLR where the court held as follows:

“13. This being an intestate succession, the court is, pursuant to the Proviso in section 71 (1) (d) of the *Law of Succession Act* (set out above), required under the parameters for the confirmation of grant in case of intestacy to be satisfied “as to the respective identities and shares of all persons beneficially entitled” and if not so satisfied, the court is empowered to “postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case”.

14. In view of the disputed facts herein whose resolution is not possible by affidavits there is need, in accordance with Rule 41 of the Probate and Administration Rules to “hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative”. The court shall, accordingly, invoke the power under section 71 (1) (d) of the *Law of Succession Act* to postpone the confirmation of grant until the resolution of the disputed facts which impact on the nature, size and share of estate of the deceased person that shall be distributed to the beneficiary. Indeed, Counsel for the petitioners hinted at such a hearing with respect to the Public trustee funds when he submitted that the court, now being seized of the matter, may call for information from the Public Trustee as to the nature of the funds which they sent to the Public Trustee upon the death of the deceased.

15. The court considers that because of the diametrical positions taken by the parties on the matter of the assets of the deceased, there is need for determination of fact by a method of fact finding other than by affidavit evidence, so that the truth of the disputed matters may be ascertained by cross-examination of the deponents of the said affidavits and or other witnesses as the parties may wish to bring forward on the relevant disputed factual issues arising from the application for confirmation grant dated 7th March 2019, in accordance with section 71 (1) (d) of the *Law of Succession Act* and Rule 41 (1) and (2) of the *Probate and Administration Rules*.”

10. The Appellant submitted that the Learned Trial Magistrate erred in confirming the grant on conflicting modes of distribution without hearing the parties as there was no affidavit of protest filed in accordance with the law and that the mode of distribution fronted by the objectors, who are the Respondents in the instant appeal was in form of a letter from their advocate. That failure to comply with the law rendered the final certificate of confirmation of grant subsequently issued defective and ought to be cancelled or set aside for want of legal compliance.

11. On the second issue the Appellant submitted that he filed the Chamber Summons application for confirmation of grant dated the 26th September, 2019 alongside a supporting affidavit sworn on 26th September, 2019 which contains the Appellant’s proposed mode of distribution where he has listed properties and proposed that they all be shared equally among the three (3) widows of the deceased.



12. It was his further submission that this was a clear error that resulted in an injustice as it was not considered, that it is a valid grievance that has resulted in denial of justice. That the said error is connected with the pre-mature determination by the learned magistrate without hearing the parties on their conflicting modes of distribution.
13. The Appellant thus submitted that the Appeal be allowed on the basis of the grounds submitted and further that the ruling of the learned magistrate be reversed and the certificate of confirmation of grant issued be reversed and set aside and the Succession Cause Number 173 of 2016 be heard afresh.
14. It was his submission that having established that the appeal is merited, the same be allowed with costs to the Appellants.
15. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See *Selle & another vs. Associated Motor Boat Co. Ltd. & others* (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
16. I have considered the Appellant's submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the Trial magistrate. It is clear that the appeal fundamentally lies against the Trial Magistrate's ruling directing that the deceased's estate be distributed as proposed by the Objectors/Respondents.
17. With regard to whether the trial magistrate failed to adhere to the substantive provisions of the *Law of Succession Act* and proceeded on wrong principles, in the impugned Ruling, the trial court observed that the parties were directed to file respective propositions on the disputed mode of distribution of the estate before final determination by the court.
18. It was the trial court's holding that at the time of writing the said ruling, only the Objectors had filed his proposal with reasons thereto on behalf of the protestors.
19. The Appellant in their written submissions indicated that he proposed a mode of distribution and the court, having considered the letter of the Objectors who are respondents to this appeal, fell into error in going directly into a determination and that the same was pre-mature.
20. He contended that substantive justice required that the conflicting modes of distribution be subjected to hearing in accordance with rule 41(1) of the Probate and Administration Rules and that the learned magistrate acted summarily and, in a rush, to do a ruling which in essence failed to accord an opportunity to the Appellant to defend his mode of distribution where he proposed that all the properties be divided among the three widows of the deceased equally. That there was no interrogation on the veracity of the allegations contained in the Advocate's letter dated 2nd May 2019 where he proposed on behalf of the Objectors, the Respondents in this appeal, that each widow remains where they were settled by the deceased
21. In considering the Objector's proposed mode of distribution as contained in their Advocate's Letter, the trial magistrate observed that; “there being no counter proposal on record on the Objectors proposition the court now endorses the averments of Counsel for the Objectors as proposed by the Objectors that is each widow and their respective children do remain and/or distribute parcels on the



basis of respective residences as before, in counties of Kericho, Bomet and Narok for 1st, 2nd and 3rd wife respectively.”

22. Upon my study of the record, I find that indeed the Appellant’s proposed mode of distribution dated 26th September, 2019 in which he proposed that the deceased estate be divided equally among the 3 widows was on record at the time of writing of the impugned ruling. However, it is worth noting that the Appellant’s proposed mode of distribution is dated 26th September, 2019 while the objector’s proposed mode of distribution which was in form of a letter to the Appellant’s advocate is dated 2nd May, 2019. The Appellant herein filed their proposed mode of distribution almost 5 months after the objectors filed their proposed mode and did not raise any concern or protest against the objectors’ proposition but rather filed their proposed mode of distribution.
23. I find that the trial magistrate erred in finding that the Appellant had not provided any mode of distribution. Ground (ii) and (iii) of the Amended Memorandum of Appeal therefore stands.
24. However, on whether the trial magistrate proceeded on wrong principles by not considering the evidence before him in total, I find that there is no protest that was filed against any of the Proposed mode of distribution. In fact, even in the instant appeal, apart from the appellant emphasizing that he did file his preferred mode of distribution, he has not formally protested against the objectors preferred mode of distribution save for an omnibus statement that the veracity of the objectors proposed mode of distribution has not been interrogated.
25. None of the other beneficiaries filed any protest against either proposed mode of distribution. The Appellant has not disputed the fact that indeed each of the widow and their children have been in occupation of the land allocated to them by the deceased for close to 50 years and embarked on ambitious developments on their respective parcels of land.
26. The Appellant has indicated that the two conflicting modes of distribution ought to have been subjected to hearing in order for parties to adduce evidence in court in support of their proposed mode of distribution and that it was pre-mature for the trial court to make a determination based on the objector’s proposal alone.
27. Upon my study of the impugned ruling and the mode of distribution proposed by the Objectors, I find that it is not in dispute that the deceased had settled his three wives in different counties during his life time that is Kericho, Bomet and Narok counties for the 1st, 2nd and 3rd wife respectively and who together with their respective children have been in a continuous, uninterrupted and open occupation of the deceased properties in the respective counties and none of them raised any complaint regarding occupation during the lifetime of the deceased.
28. I find that even though the trial magistrate failed to consider the Appellant’s proposed mode of distribution he did not proceed on wrong principles and arrived at wrong conclusion. Since each of the deceased wives has occupied the deceased land in the respective counties where the deceased settled them for more than 50 years and none of them complained during the deceased lifetime neither has anyone of them filed a protest against the Proposed mode of distribution, I am in agreement with the objectors that it can be inferred that the deceased and his three wives never at one time contemplated that there would be any future realignment of occupation contrary to what has been the status quo until the demise of the deceased. Ground (i) of the appeal therefore fails.
29. I find that it is in the best interest of all the beneficiaries that the status quo be maintained and that each widow and their children be given the properties that they have been occupying in the respective counties that is Kericho for the 1st wife, Bomet for the 2nd wife and Narok for the 3rd wife.



30. On whether the Appellant is entitled to the orders sought, I find that even though the appeal partially succeeds, the Appellant is not entitled to the orders sought.
31. Upon taking into account all the foregoing factors hereinabove, I see no reason to interfere with the impugned ruling. I am satisfied that the Trial Magistrate arrived at a reasonable finding despite not considering the Appellant's mode of distribution.
32. In the end therefore, the appeal is hereby dismissed.
33. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 16TH DAY OF MAY, 2023.

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J.K. SERGON

JUDGE

In The Presence Of:

C/Assistant - Rutoh

J. K. Mutai for the Appellant

No Appearance for the Respondents

