



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 29 OF 2018**

**EUSTACE N. PAUL.....1<sup>ST</sup> APPELLANT**

**MARY MUTHONI NJAGI.....2<sup>ND</sup> APPELLANT**

**CHARLES NJIRU KANGICU.....3<sup>RD</sup> APPELLANT**

**JAMES KARIUKI KANGICU.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**JUNTUS PAUL NJERU KANGICU.....RESPONDENT**

***(Being an appeal against the judgment of Hon. Mutai PM in Embu Succession***

***Cause No. 547 of 2017 delivered on 12.06.2018)***

**JUDGMENT**

1. Vide a memorandum of appeal dated 04.07.2018 and amended on 18.11.2021, the appellants herein filed the instant appeal having been dissatisfied with the judgment in Embu CMCC No. 547 of 2017 and thus set out the following grounds of appeal:

*(i) That the learned Principal Magistrate erred in law and fact by failing to consider the appellants' submissions and the mode of distribution and therefore granting the respondent greater share.*

*(ii) That the learned Principal Magistrate considered fully the submissions by the objector which misled the court and concealing the fact that he had been granted his share by the clan which he exchanged with one Njeru Ileri.*

*(iii) That the learned Principal Magistrate erred by relying fully on the submissions of the parties which did not elaborate fully material facts which could have been canvassed at full hearing including calling of witnesses.*

*(iv) That the learned Principal Magistrate erred in law and fact by including Margery Gichuku in the list of distribution having voluntarily forgone her share.*

2. The appellants sought for orders that the appeal be allowed with an order setting aside the lower court ruling and redistributing the Land Parcel Ngandori /Kirigi/1539.

3. This court notes from the records before it that the deceased herein died on 25.01.2006 and thereafter, Jemimah Wambui Njagi took out grant of letters of administration intestate as the administrator of the estate of the deceased in her capacity as the widow of the deceased.

4. Thereafter, Jemimah Wambui Njagi also passed on, and one Mary Muthoni Njagi under certificate of urgency filed an application wherein she sought for orders *inter alia* that pending the hearing of the Succession Cause, the court be pleased to grant orders that she be appointed the interim administrator for the purpose of prosecuting the application and also to restrain the respondents, their agents, servants or any other persons acting under their authority from evicting her, trespassing into, demolishing any structures and the house the applicant was occupying, cultivating or any way interfering with the applicants' share of Land Parcel Ngandori/Kirigi/1539. The application was based on grounds *inter alia* that she had a right to inherit from her father's estate. This court dealt with the application thus issuing orders as had been sought; thereafter, this court directed that the matter be transferred to the Magistrate's court.

5. When the summons for confirmation of grant was brought before the court, a protest was filed by the respondent herein. At the hearing of the protest, the parties herein took directions from the court whereupon each party was to file submissions in regard to his/her preferred mode

of distribution of Land Parcel No. Ngandori/Kirigi/1539.

6. The parties proceeded to file their submissions and the trial court delivered its ruling on the 12<sup>th</sup> June, 2018.

7. It is this ruling which provoked the appeal herein.

8. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another v Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

***“.....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 necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”***

9. It is the manner and the procedure that the trial court adopted in disposing off the matter that I shall address first before considering the merits of the appeal. In my view, given the nature of matters raised before the trial court in regards to a beneficiary having renounced her rights to inherit from the estate, and allegations that one of the beneficiaries namely Junius Kagicho having been bequeathed land by the clan and therefore not entitled to a share of the deceased’s land, it was necessary for the trial court to take *viva voce* evidence to ascertain the correct position in regards to these two beneficiaries rather than proceeding by way of written submissions.

10. The appellants have since submitted that a beneficiary by the name of Margery Gichuku Mwaniki had voluntarily forgone her share in the estate. Renunciations may be made in cases of the testate or intestate situations. [See in **Re Estate of John Macharia (Deceased) [2021] eKLR**].

11. It should be noted, however, that a beneficiary under a will or a survivor in intestacy cannot be compelled to take a share in the estate against their wish. In other words, it is not mandatory that a beneficiary takes his bequest or legacy under the will of the deceased or that a survivor in intestacy takes the share allotted to them. In both cases, there is liberty to renounce or disclaim the right to the share. However, in this case, there is no conclusive evidence that Margery Gichuku had forgone her share and that evidence was necessary.

12. On the same breadth, if at all the respondent had been granted his share by the clan, the same would have had to be taken into consideration when subdividing the estate of the deceased herein. [See **In re Estate of Godana Songoro Guyo (Deceased) [2020] eKLR**]. Whether or not he had been given another share could only have been established by taking *viva voce* evidence and not by way of submissions.

13. The lower court’s decision to the effect that all the beneficiaries herein share the estate equally does not have any legal backing given the circumstances herein. The trial court did not give the parties herein an opportunity to ventilate their case and as such, the best way to have solved the protest in my view, could have been for the parties to give *viva voce* evidence in order to thrash out the issues raised.

14. The circumstances dictate that the trial court re-looks into the issues presented herein, afresh, and make appropriate orders after hearing the parties. In the end, the order that commends itself to me and which I hereby grant is that;

- i. The appeal is allowed.*
- ii. The ruling in Embu CMCC No. 547 of 2017 is hereby set aside.*
- iii. The matter is hereby remitted to the trial court for determination in the manner stated hereinabove.*
- iv. Each party to bear its own costs of the appeal.*

15. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF FEBRUARY, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellants

.....for the Respondent