



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 29 OF 2020

MIRIAM NJOKI MUYA.....APPELLANT

VS.

NAHASHON GICHUHI KAMAU.....1ST RESPONDENT

JOHN GITAU MUYA.....2ND RESPONDENT

(Appeal against the original proceedings and Ruling of the Senior Principal Magistrate's Court at Kiambu, C. Oluoch, PM, in the Succession Cause No. 89 of 1991 dated 10th October, 2012)

JUDGMENT

1. This appeal is filed by **MIRIAM NJOKI MUYA** (hereinafter Miriam). Her appeal is against the judgment of the Kiambu Principal Magistrate, Oluoch (Mrs) delivered on 10th October, 2012.
2. The appeal is opposed by **NAHASHON GICHUHI KAMAU** (hereinafter **Nahashon**) and by **JOHN GITAU MUYA** (hereinafter **Gitau**).

BACKGROUND

3. The succession cause before the Kiambu Principal Magistrate's Court related to the Estate of Kamau Kiromo (deceased). He passed away on 22nd April, 1970. Nahashon and Gitau petitioned for grant of letters of administration intestate on or about April, 1991. The only property disclosed as belonging to the deceased in that petition was, LARI/MAGINA/164. The grant was issued, after gazettment of the petition on 28th August, 2007. Nahashon and Gitau failed to apply for confirmation of Grant until they were challenged by Miriam's application dated 14th June, 2011 which sought to compel them to seek confirmation of the Grant. Nahashon and Gitau filed a summons dated 27th June, 2011 for confirmation of the Grant
4. Miriam filed an affidavit of protest dated 12th July, 2011.
5. The Kiambu Principal Magistrate after receiving viva voce evidence delivered her judgment which is now the subject of this appeal.

THE APPEAL

6. Miriam has raised six grounds of appeal but at the hearing of the appeal she abandoned one of those grounds. The ground before me for consideration are as follows:-

(a) THAT the learned Principal Magistrate erred in law and in fact in misdirecting herself and holding that the court must always ensure that there is equitable distribution of property in succession causes in total disregard of the applicable Customary Law.

(b) THAT the learned Principal Magistrate erred in law in holding that Article 27 of the Constitution guarantees equality between men and women while diverting from the substance of the case and introducing the issue of discrimination on grounds of sex.

(c) THAT the learned Principal Magistrate erred in law in holding rightly that though the deceased died in 1970 and the law applicable is Kikuyu Customary Law, if the same is applied there will be no equitable distribution.

(d) THAT the learned Principal Magistrate erred in law in finding that the children of the 2nd house had no interest in the Estate in

absence of renunciation.

(e) THAT the learned Principal Magistrate erred in law in failing to appreciate Kikuyu Customary Law and ordering that distribution of the deceased Estate be according to the children of the deceased instead of the two houses of the deceased as provided for in law.

7. Miriam, in her submission considered the above grounds by submitting on ground (a) and (c) together. In support of these two grounds, it was submitted that the deceased having passed away before the enactment of the Law of Succession Act (Cap 160) and he having divided his property and the surviving beneficiaries having occupied and developed what was given to them by the deceased, the learned trial magistrate should have followed the holding in the decision by Justice John M. Mativo in the case in **REESTATE OF NGAMINI KIRIRA (DECEASED) (2016) eKLR**. That the trial magistrate should have in her judgment ordered that the subdivision of the deceased's land to maintain as much as possible the existing boundaries to ensure each beneficiary retain the portion they have occupied as allocated by the deceased.

8. On grounds of appeal (b) and (d) above, Miriam submitted that although the trial magistrate recognized that the Constitution forbids discrimination and hereby recognized equality between women and men, that nevertheless, the trial court proceeded to uphold the proposal of Nahashon and Gitau on distribution of the estate. That the trial court failed to distribute to deceased's married daughters even though they had not renounced their right of inheritance. Miriam relied on the cases **IN RE ESTATE OF MUTHONI KANYUA (DECEASED) (2018) eKLR** and **IN RE ESTATE OF EVAN MUTHUI S/O NYAMU (2019) eKLR**. In the latter case, Justice Ngaah Jairus made a holding that the Constitution had outlawed discrimination and the learned judge then proceeded to hold that girls, heirs of the deceased, who had not expressed unequivocal their renunciation of their right to inherit had a right to inherit. The learned judge held that a court should in such a case presume that the daughter's failure to pursue their right to inherit should/was not their denial to their right.

9. Miriam relying on these decisions submitted that the trial court erred to make a finding that daughters of the deceased who did not protest distribution were not interested to share in the estate of deceased.

10. On those submissions Miriam sought this Court to find that the trial court erred in upholding the distribution proposed by Nahashon and Gitau.

11. On behalf of Nahashon and Gitau it was submitted by combining all the grounds of appeal.

12. In these submissions, Nahashon and Gitau faulted Miriam in seeking distribution of the estate in equal parts between the two families of the deceased. They argued that such a distribution would lead to Miriam, on her own, inheriting 8.8 acres while the 1st house in which house Nahashon and Gitau belonged getting 8.8 acres to share amongst five beneficiaries.

13. Nahashon and Gitau further argued that the claim by Miriam to inherit 8.8 acres was caught by Section 7 of the Limitation of Actions Act (cap 22) which provide that no action for recovery of land may be filed after 12 years.

ANALYSIS

14. I will begin my discussion by discounting the submissions of Nahashon and Gitau that Miriam's claim was caught by Section 7 of Cap 22. Miriam's claim was under the Cap 160 which Law does not limit the period within which a party may lay claim to the right of inheritance. Miriam was entitled to file, as she did, her protest to confirmation of grant. I therefore reject that argument.

15. This is the first appellants court. This Court in determining this appeal is guided by the finding by the Court of Appeal in the case **GITOBU IMANYARA & 2 OTHERS V. ATTORNEY GENERAL (2016) eKLR** thus:-

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect. See SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LIMITED AND OTHERS [1968] EA 123 and WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in PETERS –VS- SUNDAY POST LTD [1958] EA 424. In its own words:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”

16. When Nahashon and Gitau petitioned, they listed the beneficiaries of the Estate as:-

(a) John Gitau Muya.

(b) Thuku Kamau

(c) Loise Wambui

(d) Miriam Nyambia (the appellant).

17. When Miriam filed her affidavit of protest, she deponed that the deceased's beneficiaries were as follows:-

1st House

(i) Nahashon Gichuhi Kamau.

(ii) Muya Kamau (deceased) survived by John Gitau Muya, Joram Kamau Muya and Freshia Waceke Muya.

(iii) Thuku Kamau (deceased) survived by Joina Wanjiru Thuku.

2nd House

(i) Muya Kamau Kiromo (deceased) survived by Miriam Njoki.

(ii) Freshia Wambui

18. Evidence was adduced by Gitau, Nahashon and Freshia Waceke Muya in support for confirmation of Grant as sought. Their evidence was to the effect that the deceased had four wives but only two bore him children. That the deceased requested in the presence of family members before his death, his male heirs to bring to him goats so that he could distribute his estate to them. That when the male heirs provided the goats the deceased divided his property LARI/MAGINA/164 with each son getting 4.4 acres. Further, that the deceased had four other plots which were divided amongst his four heirs (sons). That Miriam's husband sold their plot and she is therefore not entitled to receive a plot from the estate.

19. Nahashon further stated that his married sisters had not laid a claim over the estate.

20. Miriam testified in support of her protest. She too confirmed deceased had children with two wives. The first wife had four children with only Nahashon surviving and second wife had six children with only two surviving. Miriam further stated that each heir was cultivating on their portion of land. She further stated she had 7 acres and wished the court to divide the property equally between the two houses. She confirmed that her husband did sell one plot of the estate.

21. The trial court identified one issue that required determination. That issue was how the estate should be distributed and which law should guide the court. The trial magistrate made a finding that although the Kikuyu Law of Succession applied, since deceased died in 1970 before Cap. 160 was enacted, she however made a reference to the **Judicature Act, section 3(2)** which provided that Customary Law may guide the court so long as it is not repugnant to justice and morality or inconsistent with any written law. In view of that provision the trial court bore in mind **Article 27** of the Constitution, which Article guarantees equality between men and women and prohibits any discrimination on the basis of sex.

22. Miriam affidavit of protests only related to the property LARI/MAGINA/164. She did not oppose the distribution of the plots. Later, however, in her *viva voce* evidence she contradicted herself and alleged she was entitled to inherit a plot since each beneficiary was getting two plots and she and her husband only got one.

23. What does one do with such clear contradiction? This, however, I found was characteristic of Miriam's case. Even in her submission in support of her evidence, she confirmed what Nahashon and Gitau contended, that each beneficiary was occupying and cultivating their own identifiable portion of the land but then she went on to allege the trial court discriminated some of married daughters of deceased. She made this allegation despite her proposal in her affidavit of protest that the first house combined should inherit 8.7 acres and she alone in the second house should inherit 8.8 acres. One is left wondering where her philanthropic sentiments towards the married daughters of the deceased, who are children of the second house, were when she filed her affidavit of protest requesting that she alone should inherit 8.8 acres on behalf of the second house.

24. Miriam also alleged that she was not informed by Nahashon and Gitau when they petition for grant for letters of administration. In her *viva voce* evidence she did not state how she became aware of the petition at all. On a balance of probability I find that Miriam must have known of the filing of the petitioning but failed to participate when it suited her. It suited her to file a protest.

25. On the whole, I find Miriam's appeal to be devoid of merit. The proposal made by Nahashon on the distribution of the properties of the estate are fair to all beneficiaries but perhaps more importantly it was proved on evidence that the distribution was made by the deceased before his death. That fact is supported by the evidence adduced by all that each beneficiary occupies and cultivates an identifiable portion.

26. Miriam's appeal in view of the above findings fails.

DETERMINATION

27. The judgment of this Court is:-

(a) This appeal is dismissed and the determination of the trial court is upheld save that the confirmed grant and the demarcation of LARI/MAGINA/164 shall maintain as much as possible the existing boundaries and shall ensure each person retains the portion they occupy.

(b) Since this court finds that this was unmeritorious appeal Miriam shall pay the costs of this appeal.

Orders accordingly.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court AssistantNdege

Appellant:Mrs. Muhuhu

Respondent:Ms. Kater H/B Mr. Makori

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE