IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 75 OF 2019

GRACE NJAMBI MBUGUA...1ST APPELLANT

JAMES NDIRANGU MBUGUA..2ND APPELLANT

DAVID MWAI MBUGUA...3RD APPELLANT

SIMON NDUNGU MBUGUA..4TH APPELLANT

VS.

JOSEPH KABAIKU..RESPONDENT

(Appeal from the Ruling of the Senior Magistrate's Court at Githunguri Hon. C. Kutwa, SPM

in Githunguri Succession Case No. 84 of 2015 delivered on 25th April, 2015)

JUDGMENT

1. The grant of letters of administration intestate, in succession cause No. 84 of 2015 was issued by the Principal Magistrate Githunguri, jointly to ***Joseph Kabaiku Mbugua*** and ***James Ndirangu Mbugua*** on 27th January, 2017. The only asset of the deceased's estate is property **GITHUNGURI/KANJAI/889**. By a confirmed grant dated 16th November, 2017 the said property was ordered to be shared equally amongst the following:-

· Grace Njambi Mbugua – son

· James Ndirangu Mbugua – son

· Joseph Kabaiku Mbugua – son

· David Mwai Mbugua – son

· Simon Ndungu Mbugua - son

2. The widow and her sons **James Ndirangu, David Mwai** and **Simon Ndungu** filed an application dated 15th December, 2017 citing **Joseph Kabaiku** as the respondent. By that application the applicants sought the revocation of the grant. The trial court by its ruling dated 17th May, 2018 dismissed that application.

3. The applicant filed another application dated 19th July, 2018 by which the applicants sought that the sub-division of the property be carried out according to the family's agreement on the mode of distribution. That agreement was reached in a family meeting in the presence of elders. The trial court undertook a site visit of the property on 24th January, 2019. Following that site visit the trial court ordered a surveyor be procured to determine where each beneficiary's share should be. The surveyor was unable to undertake that task and filed a letter dated 13th March, 2019 before the trial court stating he was unable to carry out the survey work. This is what the surveyor in part stated in that letter:-

> ***"It has become untenable to continue offering the said services owing to the absence of co-operation by the parties herein together with receiving conflicting instructions making my work extremely difficult if not entirely impossible."***

4. In view of that drawback of failure to resolve the issue of where each beneficiary would be allocated their inheritance, the trial court after receiving the parties' submissions delivered a Ruling to the application dated 19th July, 2018.

5. That Ruling is dated 25th April, 2019. The trial court referring to the site visit held as following:-

> ***"At the scene the court noticed that the property had already been shared out amongst the beneficiaries long before the grant was confirmed. At the time (sic) there was no dispute and or protest from the applicants. Further, the entire piece of land is prime. The sub-divisions that the piece of lance near the road is the only prime parcel is neither here nor there.***
>
> ***In the premises, I do order that the beneficiaries do remain in their respective piece of land. What the Land Registrar is supposed to do is to endure that all the beneficiaries get equal shares and adjust the boundaries accordingly."***

6. The applicants were aggrieved by that ruling and accordingly filed this appeal.

7. An appeal to this Court is by way of retrial. This Court is required to reconsider the evidence, evaluate itself and draw its own conclusion always, however bearing in mind that this Court has neither seen nor heard the witnesses: See the case ***SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1969) EA 123***.

ANALYSIS

8. I have perused the grounds of appeal. I wish at this initial stage to state that the applicants' appeal is against the trial court's ruling to the application dated 19th July, 2018. That is the application by which the applicants sought the adoption by the trial court, of the family's mode of distribution. It follows that the applicants cannot seek to argue in this appeal, issues relating to the confirmation of the grant because those issues were in the ruling of the court dated 17th May, 2018. No appeal was filed against that ruling. It follows the first ground of appeal presented by the applicants is outside the purview of this appeal.

9. The other grounds of appeal seek the determination that the trial court erred in failing to consider the mode of the family meeting.

10. The family agreement which the applicants sought it be adopted by the trial court by their application dated 19th July, 2018, was recorded in Kikuyu language, which was interpreted into English language and was annexed to the application. This is what the family mode of distribution consisted of:-

> ***"1. The deceased's*** *(Grace Njambi Mbugua)* ***wife's pit latrine should remain at the same spot.***
>
> ***2. The deceased's wife should allocate the land to the children according to how she sees fit.***
>
> ***3. Their present land allocation is according to the mother's Will of where they should farm but the land has not been subdivided.***
>
> ***4. Elders from both sides have come to the conclusion that the children should accord their mother respect and they should live in peace."***

11. I have considered the parties submission in this appeal. The trial court had the advantage of visiting the site and observed how each beneficiary occupied the property. The trial court concluded that the beneficiaries had previously shared out the property. The trial court ordered the beneficiaries retain their shared out property and further ordered that the final sub-division was to ensure the beneficiaries got equal shares as per the confirmed grant. I have no basis presented by the applicants to differ with the trial court's holding. This is because the trial court visited the property and noted how each beneficiary occupied that property. In this regard, I wish to refer to the Court of Appeal decision in the case ***MAGNATE VENTURES LIMITED VS. ALLIANCE MEDIA (K) LIMITED & OTHERS (2015) eKLR***, as follows:-

> ***"Having evaluated the entire evidence on record, we do not see the basis for disagreeing with the learned judge. As has been said time and again, it is a strong thing for this Court to differ with the conclusion of the trial judge on questions of fact and further that this Court will not substitute its opinion for that of the trial judge merely because, in the shoes of the judge, it would possibly have come to a different conclusion.***

In *SUSAN MUNYI V. KESHAR SHIANI,* ***C.A. NO. 38 OF 2002, this Court explained the rationale of the above approach thus:-***

> ***"…we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common-sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."***

12. Additionally, I have hereinabove reproduced the mode of distribution proposed in the family meeting. That mode of distribution is not by any stretch of imagination what can be said to be distribution. That family agreement essentially stated that the widow would decide where the other beneficiaries will farm. That agreement of the family is in my view unenforceable under The Law of Succession.

CONCLUSION

13. This is an appeal without merit. It is dismissed with costs.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF DECEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: **Maurice**

For the Appellants: Ms. Kamuyu

For the Respondent: No appearance

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE