REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 32 OF 2018

SILVERIOUS KITHINJI NGOROI.....APPELLANT

VERSUS

DICKSON NJERU NGOROI.....1ST RESPONDENT

EUNICE WAMUGO NGOROI.....2ND RESPONDENT

JUDGMENT

A. Introduction

1. The Appellant herein being dissatisfied with the judgment of the trial court delivered on 5/04/2018 by Hon. Ngeng'eri (RM) in Succession Cause No. 375 of 2017 filed the instant appeal vide a memorandum of Appeal dated 18/07/2018 and filed in court on the same date. The Appellants framed five (5) grounds of appeal to wit: -

> 1. The learned resident magistrate erred in law and in fact in not upholding applicant's manner of distribution of the estate as set out in the application for confirmation of grant in-spite of overwhelming evidence in favour.
>
> 2. The learned resident magistrate erred in law and fact in distributing the estate equally between the two houses without accounting for the numbers units (beneficiaries) in each house and thus gave disproportionate distribution to the houses.
>
> 3. The learned resident magistrate erred in law and fact in distributing the land Gaturi/Githimu/246 equally between the two houses irrespective of the number of units in respective houses.
>
> 4. The learned resident magistrate erred in law and fact in distributing the share/estate in Plot No. 3 and 25 Kianjokoma Market equally to each house irrespective of the number of units in each house, an action which engendered inequality among the stakeholders/ beneficiaries.
>
> 5. The learned resident magistrate erred in law and fact in not considering that in the first house are 6 units while in the second unit are 11 units and thus occasioned disproportionate distribution of the whole estate.

2. The appellant as such prayed for orders that the estate land parcel Gaturi/Githimu/246 be shared between/ distributed to the two houses on the basis 6:11 a proportionate ratio and that Plots No. 3 and 25 Kianjokoma Market be managed for the benefit of all beneficiaries so that the proceeds by way of rent be banked and shared annually and equally among the beneficiaries.

3. The appeal was canvassed by way of written submissions.

B. Submission by the parties

4. The appellant filed his written submissions and wherein he supported his grounds of appeal and submitted that land parcel number Gaturi/Githimu/246 measuring 1.214 Ha should be distributed amongst the 15 units (since two of the beneficiaries were deceased) and thus each should get 0.0809 Ha and the two plots No. 3 and 25 Kianjokoma Market should be held in trust for the entire deceased family by Silverius Kithinji Ngoroi for the 2nd house and Dickson njeru ngoroi for the 1st house and the two to open a joint account where the share of the rent received from the two plots would be deposited for annual distribution in equality to all beneficiaries.

5. The 2nd respondent submitted to the effect that Land Parcel No. Gaturi/Githimu/246 ought to be distributed in accordance with the

provisions of section 40 of the Law of Succession Act. As for Plots No. 3 and 25 Kianjokoma market, the Respondent submitted that the same were not owned by the deceased alone and as such the same should be left as they are owing to the fact that the deceased was not the sole owner.

C. Re-evaluation of evidence

6. This court is obligated, in exercise of its role as the firsts appeal court, to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). However, this court ought not to ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348). The format to be conformed to in re-evaluation of the said evidence is not fixed but the re-evaluation** should be done depending on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

7. In the trial court, the appellant herein petitioned for letters of administration in relation to the estate of the deceased herein (Ngoroi Kagane) as the son of the deceased. The pleadings in relation to the said petition were filed in court on 23/07/2015. The 1st and 2nd Respondents together with ten (10) other beneficiaries filed an objection to making of grant which was undated and filed in court on 10/08/2015 and which objection was based on the grounds that Appellant herein refused to inform the objectors during the filing of the petition and neither were they invited by the Appellant to accompany him to the Chief's office for the letter.

8. By consent by all the parties (Appellant and the objectors) the Appellant and the 2nd Respondent were appointed as the administrators of the estate herein. However, the said administrators were not agreeable as to the mode of distribution and as a result of which each of them was directed to file their individual mode of distribution and to exchange documents. The dispute as to the mode of distribution proceeded for hearing and wherein the 2nd Respondent (the protester therein) called evidence in support of her case and the same case to the Appellant (the petitioner therein).

9. The trial court proceeded to deliver its judgment and wherein the trial court held that land parcel Gaturi/Githimu/246 to be shared equally between the two houses and the surviving widow to be considered as additional unit; share in Plot No. 25 Kianjokoma Market to be shared out to the members of the second house; share in Plot No. 3 Kianjokoma market to be shared equally amongst members of the first house; and amendments to be made in the petition to include a member of the first house as a co-administrator to the estate of the deceased. It is this ruling which necessitated the appeal herein.

D. Issues for determination

10. I have read through and considered the memorandum of appeal, the submissions of both counsels and the authorities referred to by each counsel to support their legal propositions in the matter. Further I have read and evaluated the record of appeal and evidence adduced before the trial court by the parties herein.

10. From my analysis of the instant appeal, the parties herein contention is as to the mode of distribution with the appellant's case being that the court ought to have distributed the estate equally amongst all the 15 surviving beneficiaries of the estate and on the other hand the 2nd Respondent maintaining her position that the estate ought to be distributed equally as between the two houses as the same was how the families have been living ever since (as they had been shown by the deceased). It is my opinion that the main issue for determination in this appeal is how the estate of the deceased ought to be distributed?

E. Determination of the issue

12. To answer the issue hereinabove formulated, it is important to appreciate the provisions of laws which govern the distribution of the estate of a person upon such person's demise and which relates to the estate or issue herein. Generally, the law governing the said distribution (succession) is the Law of Succession Act cap 160 Laws of Kenya. The long title of the Act provides that the same is

> **"*An* Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto"**

Section 2 of the Act provides for the application of the Act. It provides as thus: -

> **"2 (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.** (emphasis mine)
>
> **(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act. (emphasis mine"**

13. My understanding of this section is that any person who died before the commencement of the Act his estate shall be governed by the customs applying at the date of his death. I am guided by the Court of Appeal's decision in **Eliud Chira Muriithi & 2 others v Kinyua Muriithi Ngari [2016] eKLR** where the court held that: -

"……..Having considered the evidence and the record, we find as did the learned Judge, that the deceased having died in 1976, the law governing the distribution of his intestate estate was Gikuyu Customary Law. The Judge was therefore right to apply the principle recorded in Prof. Cotran's Restatement of African Law, Vol.2 on Succession, which is that inheritance under Gikuyu customary Law is patrilineal, based on distribution of a man's property amongst his wive's houses, though the eldest may get a slightly larger share……"

14. In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichingo Mbura alias Mwaura Mbura (deceased) (NBR HC Succession Cause No. 935 of 2003), the court held that since the deceased died before the Act came into force, the applicable law on the distribution of the estate was customary law, but the law applicable to the administration and procedural aspects of the estate was the Law of Succession Act**.**

(See also Philis Michere Mucembi vs Wamai Muchembi [2010] eKLR, Rose Kuthii Weru v Mercy Koina [2015] eKLR).

15. It was not disputed that the deceased herein died in 1975 and which was before the commencement of the law of Succession Act (1/07/1981). As such, the Applicable law in the distribution of the estate herein ought to have been in accordance with Kiembu customary law. It is my opinion that the Learned Trial Magistrate erred in law by subjecting the said estate to the provisions of the Law of Succession Act (section 40).

16. The 2nd Respondent in her proposed mode of distribution suggested equal distribution. In the affidavit sworn on 8/11/2017, she deposed that the deceased herein had shared his estate and in relation to LR Gaturi/Githimu/246, it was deposed that each of his two wives had been shown her side to develop and build her house and as such, the said property should be shared equally amongst the two wives. Her witness statement which she adopted in court was to this effect. This evidence was corroborated by that of 2nd witness for the protester. The Appellant's witness statement which he adopted in court did not touch on the Gaturi/Githimu/246. However, in his oral evidence in court, he added that nothing was sub-divided. His witness supported the mode of distribution proposed by him.

17. It is my opinion that considering the above evidence, it is most probable that the deceased had shown the two deceased as to where they were to live/build their houses. As I have noted, the deceased herein died in 1975. At that time, the prevailing custom was that property would be divided equally in between the wives and irrespective of the number of children such a wife had. It is my opinion that this is the approach the deceased had taken. As such it is my opinion that the only mode of distribution which ought to be applied is the one proposed by the 2nd Respondent herein as it is in tandem with the Embu customary law. There was no evidence by the Appellant that Embu customary law recognized a division akin to the one provided for under section 40 of the Act (proportional to the number of units and the wives forming part of the said unit).

18. As for the Plots, the conflicting evidence was between the same having been developed by the 1stborn from each of the family and the same having been developed by the deceased. However, it is not in dispute that the two families occupy a different plot each. Neither is it shown that at any time the two families ever pooled together the income generated from the two plots and shared equally. There is also uncontroverted evidence that the deceased did not own the said plots absolutely but jointly. The protestor's witnesses testified to the effect that the said plots were owned by the deceased and other persons. It is my opinion that the status quo in relation to the said plots ought to be maintained.

19. The property which ought to be subjected to succession is the free estate of the deceased. The evidence before the trial court was not sufficient so as to establish the status of the ownership of the said plots as in between the deceased and the other owners.

20. The court was told that the property is jointly owned. It is trite that there are two forms of joint ownership; ownership in common and joint proprietorship. In joint tenancy, the owners have separate rights but carries with it the right of survivorship (*jus accrescendi*) which means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant and a joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. In tenancy in common on the other hand, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. However, in ownership in common, the doctrine of survivorship does not apply and as such, the share of one tenant is not affected by the death of one of the co-owners and the share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. (See Isabel Chelangat vs. Samuel Tiro Rotich & 5 others (2012) eKLR).

21. There was no evidence as to the mode of ownership between the deceased and the other owners of the two plots. The witnesses who confirmed the ownership of the plots as not owned solely by the deceased herein did not explain the mode of the said ownership. As such it is my opinion that the trial court ought not to have distributed the said plots in the circumstances.

22. Rule 42(3) of the Probate and Administration Rules 1980, provides that: -

"Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant."

23. It is my opinion that in the circumstances that the ownership of the two plots is not clear, the trial court ought to have invoked the provisions of the above provision and set aside the two plots for the issue as to ownership to be determined. Otherwise the said plots were never part of the free estate of the deceased and neither were the shares of the deceased therein were. I note that the deceased died before the commencement of the Law of Succession Act but however, section 2(2) does not limit the administration of the estate of such a deceased person. However, setting aside the said plots in my opinion is not akin to subjecting the same to the Law of Succession Act per se but part of

the administration of the estate by the administrator and which the act applies.

24. In conclusion and taking into account all the above, it is my opinion that the trial court misdirected itself in applying the provisions of section 40 of the Law of Succession Act whereas the deceased died before the same commenced being in force in Kenya. The land parcel Gaturi/Githimu/246 ought to be divided equally between the two houses. As for the plots, the same ought to have been set aside under Rule 42(3) for the ownership status to be determined.

25. Due to the nature of the appeal, this being a succession matter, each party shall bear its own costs of the appeal.

26. It is so ordered.

Delivered, dated and signed at Embu this 2nd day of November 2020.

L. NJUGUNA

JUDGE

.....for Appellant

.....for Respondents