



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 54 OF 2018**

DANIEL MWAI GATIMU .....1<sup>ST</sup> APPELLANT

MICHAEL MUGAMBI GATIMU.....2<sup>ND</sup> APPELLANT

ANTONY KINYUA GATIMU .....3<sup>RD</sup> APPELLANT

JAMES NDEGWA GATIMU.....4<sup>TH</sup> APPELLANT

SUSAN NJOKI GATIMU .....5<sup>TH</sup> APPELLANT

VERSUS

TABITHA MUTHONI MUGO .....RESPONDENT

*(Being an appeal from the judgment of Hon. Daffline Nyaboke Sure dated 17<sup>th</sup> August 2018 delivered in Wanguru Succession Cause No. 242 of 2016)*

**JUDGMENT**

1. This is an appeal from the judgment of *Hon. Daffline Nyaboke Sure, Resident Magistrate, Wanguru* in Succession Cause Number 242 of 2016 in which the trial court determined a protest filed by the appellants herein. The appellants and the respondent were all children of the deceased.

2. The court record shows that the deceased died intestate on 15<sup>th</sup> October 2001. One of his daughter's, *Tabitha Muthoni Mugo*, the respondent in this appeal obtained grant of letters of administration of his estate on 15<sup>th</sup> February 2016. When she applied for confirmation of the grant, the appellants filed a protest objecting to the mode of distribution of the estate proposed by the respondent. The trial court heard the protest and ordered that land known as *MWEA/TEBERE/B/1460* which was the only property available for distribution be shared equally by *Tabitha Muthoni Mugo, Charity Wangeci Ndege* and *Boniface Gatimu*.

*Tabitha Muthoni Mugo, Charity Wangeci Ndege* were also daughters of the deceased while *Boniface Gatimu* was a son to one of the daughters who had passed on.

3. The protestors (appellants) were aggrieved by the trial court's decision. They proffered this appeal vide a memorandum of appeal filed on 12<sup>th</sup> September 2018 relying on the grounds replicated below:

*i. That the learned magistrate erred in law and fact in making judgment against the weight evidence.*

*ii. That the learned magistrate erred in law and fact in disregarding the evidence put forth by the appellants.*

*iii. That the learned magistrate erred in finding that the 5<sup>th</sup> protestor was given 3 acres out of the deceased's estate whereas these 3 acres were registered in the 5<sup>th</sup> protestor's son one Samuel Waweru Gatimu who was bequeathed the 3 acres during the deceased's lifetime.*

*iv. That the learned magistrate erred in law in not including the 5<sup>th</sup> protestor in sharing the residual estate namely Land Parcel No. MWEA/TEBERE/1460 while she had not been bequeathed any gift by the deceased during his lifetime.*

*v. That the learned magistrate erred in law and in fact by excluding the protestors from the remaining land which formed part of the residual estate.*

4. When the appeal came up for hearing, the court directed in the presence of both counsel on record that the appeal be prosecuted by way of written submissions. The appellants duly filed their written submissions but the respondent did not.
5. In their written submissions, the appellants through their advocates, *Wanjiru Waweru & Company Advocates* apparently abandoned the 1<sup>st</sup>-4<sup>th</sup> appellants claim to the deceased's residual estate and only attacked the trial court's finding on grounds that it excluded the 5<sup>th</sup> appellant from sharing the deceased's residual estate as she had been gifted with three acres of land during the lifetime of the deceased.
6. In her submissions, learned counsel for the appellants contended that the three acres had not been given to the 5<sup>th</sup> protestor but to her son one *Samuel Waweru*; that the 5<sup>th</sup> protestor being a daughter of the deceased was a beneficiary of the estate and was entitled to a share of the same; that the trial court's finding disinherited her and amounted to discrimination which is outlawed by *Article 27* of the *Constitution of Kenya 2010*.
7. As stated earlier, the respondent did not file any submissions to counter those filed by the appellants.
8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am alive to the duty of a first appellate court which was succinctly enumerated by the Court of Appeal in *Selle V Associated Motor Boat Company Limited, [1968] EA 123* in the following terms:

***"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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."***

9. I have carefully considered the grounds of appeal, the evidence on record and the appellants' written submissions.
10. Having done so, I find that it was not disputed in the lower court that all the protestors are children of the deceased and that they had been gifted with parcels of land of different sizes by the deceased prior to his death.

The 2<sup>nd</sup> protestor who was authorized by the other protestors to file the affidavit of protest and to prosecute it on his own behalf and on behalf of the other protestors testified that the 1<sup>st</sup>-4<sup>th</sup> protestors had been gifted with 7 acres of land each while the 5<sup>th</sup> protestor was given 3 acres of land by the deceased before he died.

The petitioner in her evidence confirmed the protestor's claim and in addition asserted that the land given to the 5<sup>th</sup> protestor had been registered in her son's name one *Samuel Waweru*.

11. In view of the foregoing, it is my finding that the only issue which arises for my determination in this appeal is whether the learned trial magistrate erred in her finding that as the protestors had already been given property by the deceased during his lifetime, they should not get a share of the deceased's residue estate; that the residue estate should be shared by the other beneficiaries who had not benefited from the deceased in his lifetime.

12. In her judgment, the learned trial magistrate analysed the evidence adduced before her and after considering the provisions of the *Constitution* and *Section 42* of the *Law of Succession Act* stated as follows:

***"With the above legal positions, protestors' received a bigger share of the land during the lifetime of deceased. I cannot turn a blind eye and include them in the residual estate. What the deceased thought, he had the freedom to think and act, and indeed gifted his sons, daughter the biggest share out his land. It is only fair and equitable to exclude them from the remaining land measuring 1.502h."***

13. She proceeded to order that the land comprising the net intestate estate namely *LR/MWEA/TEBERE/B/1460* be divided equally between *Tabitha Muthoni Mugo*, *Charity Wangeci* and *Boniface Gatimu* who were the beneficiaries who had not benefited from the deceased during his lifetime.

14. *Section 42* of the *Law of Succession Act* (the Act) provides as follows:

***"Where—***

***(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***

***(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."***

15. The provision enjoins courts when distributing estates to take into account gifts made to beneficiaries by the deceased during his lifetime

in determining what share will accrue to each beneficiary from the net estate. The wording of that provision leaves no room for doubt that it was intended to ensure that there was fairness and equity in the distribution of intestate estates.

16. The mischief that Section 42 of the Act was meant to cure was aptly captured by Gikonyo J in William M'Arimi Mutuambae V Rosemary Karamuta for estate of George Gatimi [2017] eKLR when he stated as follows:

***“I have said before and I will repeat here that section 42 of the Law of Succession Act is intended to bring fairness and equity in the sharing of the estate of the deceased amongst the beneficiaries. The section also acts as restraint on any insatiable appetite by an inconsiderate beneficiary whose only intent is to get double portion of or as much as possible from the estate without consideration of fairness and equity in the distribution of the estate. It is not uncommon that persons who have been provided for by the deceased during his lifetime with land or other settlements still come back- and without disclosing the earlier settlement or bequest to them by the deceased- claim a bite of what was left for the others. It be known henceforth, that such earlier settlements or gifts in the lifetime of the deceased are in law referred to as gifts inter vivos and are taken into account under section 42 of the Law of Succession Act in determining the share of the net intestate estate finally accruing to the donee.”***

I cannot agree more.

17. In this case, all the protestors through the evidence of their representative (2<sup>nd</sup> protestor) admitted in their evidence that they had been gifted with parcels of land by the deceased during his lifetime. The 1<sup>st</sup>-4<sup>th</sup> protestors received 7 acres each while the 5<sup>th</sup> protestor received 3 acres. For the avoidance of doubt, I think it is prudent to reproduce PW1's evidence on this point verbatim. In his evidence, he stated as follows:

***“... It is true, deceased gave us land when he was alive, what remained was for deceased. He gave four boys land and one sister Susan Njoki was given 3 acres. I don't know why our sister was given land. We were given land in 1991. ...”***

18. In view of PW1's evidence and the fact that it is not disputed that Tabitha Muthoni Mugo; Charity Wangeci Ndege and Boniface Gatimu were beneficiaries of the estate who were also entitled to get a share of the estate and in view of the provisions of Section 42 of the Law of Succession Act, I am unable to fault the trial magistrate's finding that it was only fair and just to exclude the protestors from the distribution of the residual estate as they had already benefitted from gifts from the deceased during his lifetime.

19. The petitioner claimed and this was not disputed by the appellants that the residual estate comprised of land measuring only 4 acres. It would have been unjust, inequitable and discriminatory if the trial court had given the protestors an additional share of the residual estate which was smaller in size than the land majority of them had already received from the deceased.

20. The claim by the 5<sup>th</sup> protestor in her written submissions that she had not been gifted with any land by the deceased during his lifetime and that the gift of 3 acres had been given to her son is not supported by any evidence on record. It is important to emphasize that courts only make findings on the basis of evidence presented before them and not on the basis of submissions. It is trite that submissions do not amount to evidence and cannot take the place of evidence. This position was well articulated by the Court of Appeal in Daniel Toroitich arap Moi V Mwangi Stephen Muriithi & Another [2014] eKLR where the court stated as follows:

***“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”***

21. The 5<sup>th</sup> protestor having failed to adduce evidence during the trial to counter the petitioner's claim that she had been given 3 acres of land by the deceased prior to his death cannot benefit from such a claim made in submissions on appeal.

22. For all the foregoing reasons, it is my finding that this appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED and SIGNED at NAIROBI** this 8<sup>th</sup> day of October 2019.

**C. W. GITHUA**

**JUDGE**

**DATED and DELIVERED at KERUGOYA** this 11<sup>th</sup> day of October 2019.

**L. W. GITARI**

**JUDGE**