



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 26 OF 2018

MARGARET WANJIRA GATHIMBA.....APPELLANT

VERSUS

CHARLES MWANGANGI.....RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal arises from the judgment of the Chief Magistrate Embu in Succession Cause No. 66 of 2003. The respondent seeks for orders for confirmation of grant dated 30/03/2017 in which he sought that L.R. No. Baragwi/Raimu/1912 be shared equally between the 10 sons of the deceased, that Rwambiti Plot No.2 goes to the appellant together with Barclays Bank shares, Gichugu Housing shares and Ngariama Ranching Scheme shares whereas shares in L.R. No. Baragwi/Raimu/490, Kenya Airways shares and Kenya Commercial Bank go to him.

2. In protest, the appellant sought that L.R. No. Baragwi/Raimu/ 1912 compromised her matrimonial home and ought to go to her. She further submitted that the deceased's first house benefit from the Barclays Bank of Kenya shares and Gichugu Housing shares while, the second house benefit from the Kenya Airways shares and Baragwi/Raimu/490 while her house benefits from the KCB, NIC Bank shares and L.R. No. Baragwi/Raimu/1912.

3. The trial court found in favour of the respondent and proceeded to confirm the summons for confirmation of grant dated 30/03/2017. Being dissatisfied with the trial court's judgement, the appellant lodged this appeal dated 4th May 2018 on 6 grounds that may be summarised as follows: -

a) That the learned magistrate erred in law and in fact by confirming the summons for confirmation of grant dated 30th March 2017 filed by the respondent and consequently disinheriting the appellant.

b) That the learned magistrate erred in law and in fact by holding that there was a valid oral will whereas the summons by the respondent sought to confirm the grant for letters of administration intestate.

4. The parties filed submissions to dispose of the appeal.

B. Appellant's Submissions

5. It is submitted that the magistrate erred in law by relying on witness statements that were not properly on record with regards to his finding on the validity of the oral will as the aforementioned witnesses never appeared in court to produce the statements and as such the statements were inadmissible.

6. It was further submitted that the magistrate purely violated rule of practice by pleading on behalf of the litigants by expressing himself on issues that were not before him for determination and this affected the outcome of his entire judgement. Reliance was placed on the case of **Dakianga Distributors (K) Ltd v Kenya Seed Company [2015] eKLR** where it was held that there is no part of the duty of the court to enter upon an inquiry on matters that are not before it or captured in the pleadings of the parties therein.

7. It was submitted that the purported oral will did not meet the requirements of **Section 9 of the Law of Succession** and espoused in the case of **Estate of Elizabeth Wanjiku Munge (Deceased) [2015] eKLR** on the requirements for a valid oral will.

8. It was submitted that the land known as L.R. No. Baragwe/Raimu/ 1912 constituted matrimonial property and as the appellant was the only surviving widow of the deceased, and as she resided on that land, the confirmation of the certificate of grant effectively evicted her. Relying on the case of **Bob Njoroje Ngarama v Mary Wanjiru Ngarama & Another [2014] eKLR** it was submitted that the appellant enjoyed a life interest in the net estate of the deceased and upon her demise or remarriage the net residue estate shall be divided amongst the remaining

beneficiaries.

9. It was also submitted that there being a dispute on the subdivision of the estate the court was to apply the provisions of section 35 of the Law of Succession Act as was held in the case of Elishiba Njoki Njari & Anor v Purity Gathoni Njari & 3 Others [2017] eKLR.

C. Respondent's Submission

10. It was submitted that the trial court correctly applied section 40 of the Law of Succession Act in confirming the certificate of confirmation of grant as the deceased was polygamous. Reliance was placed on the case of Machakos Succession Cause No. 345 of 2003 Maurice Ndambuki Kitivo & Anor v Michael Musau Kitivo [2014] eKLR, Kerugoya Civil Appeal No. 42 of 2015 Irene Mabuti Gitari v Zacharia Njege Gitari [2017] eKLR and that of Nyeri Court of Appeal Civil Appeal No. 34 of 2004 Catherine Nyaguthi Mbauni v Gregory Maina Mbauni [2009] eKLR.

11. It was also submitted that contrary to the allegations by the appellant, the trial magistrate did not disregard the doctrine of *stare decisis*. Further, it was submitted the 3rd house of the deceased had greatly benefited from the estate of the deceased during his lifetime and the same should be taken into account while distributing the deceased's estate as enshrined in Section 42 of the Law of Succession Act and as held in the case of Nyeri Succession Cause No. 52 of 2010, In the Matter of the Estate of Ruth Nyakanini Rukwaro (deceased), Mary Wanjiru Mwai & Anor v Joseph Rukwaro Ndiuni.

D. Analysis & Determination

12. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of Selle & Anor. v Associated Motor Boat Co. Ltd (1968) EA 123). This court nevertheless appreciates that an appellate Court will not 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. This was the holding in Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga v Kiruga & Another (1988) KLR 348.

13. I have carefully perused the record of appeal and the parties' submissions. This appeal rests on whether the trial court erred in confirming the summons for confirmation of grant dated 30/03/2017.

14. The issues for determination in my opinion are as follows:

a) *Whether the learned magistrate erred in law and in fact in entertaining matters that were not leaded specifically the validity of the alleged oral will of the deceased?*

b) *Whether the matrimonial home should form part of the share of the surviving widow.*

15. In the summons for confirmation of grant dated 30/03/2017, the respondent sought that L.R. No. Baragwi/Raimu/1912 be shared equally between the 10 sons of the deceased, that Rwambiti Plot No. 2 goes to the appellant together with Barclays Bank shares, Gichugu Housing shares and Ngariama Ranching Scheme shares whereas shares in L.R. No. Baragwi/Raimu/490, Kenya Airways shares and Kenya Commercial Bank go to him. In protest, the appellant sought that L.R. No. Baragwi/Raimu/1912 comprised her matrimonial home and ought to go to her. She further submitted that the deceased's first house benefit from the Barclays Bank of Kenya shares and Gichugu Housing shares while, the second house benefit from the Kenya Airways shares and L.R. No. Baragwi/Raimu/490 while her house benefits from the KCB, NIC Bank shares and L.R. No. Baragwi/Raimu/1912.

16. The law is well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings to be disregarded. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....."

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

17. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a

material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

18. The issue for determination before the trial court was purely the distribution of the estate. The respondent’s mode of distribution was contained in the summons for confirmation of grant dated 30th March 2017 while that of the appellant was in his affidavit of protest. It is clear from the record that neither the appellant nor the respondent pleaded or alluded to the issue of the existence of an oral will. The record shows that the witness statements relied on by the trial magistrate had been filed in support of an earlier application.

19. The relevant Section of the Law with regard to oral wills is Section 9 of the Law of Succession Act which provides that:

“9. (1) No oral will shall be valid unless:

(a) It is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making the will.”

20. In any case in **Re Rufus Ngethe Munyua (deceased) Public Trustee v Wambui (1977) KLR 137** and **Beth Wambui and Another - vs- Gikonyo and others (1988) KLR 445** the courts in both instances held inter alia that if the witnesses present during the making of an oral will make a record of the terms of the oral will, so long as it meet the requirements of Section 9, of being made in the presence of two or more competent witnesses and the maker dies within three months, then that oral will would be considered valid.

21. As for compliance of the said oral will with Section 9 of the Succession Act is concerned, I note that the date the will was made was not given in the evidence of the parties. It is from the date of making will that the three (3) months life of an oral will starts to run. In the absence of this critical date, it is not possible to determine whether the oral will, if any, had outlived the three (3) months period and therefore, become invalid.

22. This succession cause was filed as an intestate succession which confirms that the issue of an existing oral will was an afterthought. The respondent in his amended affidavit in support of the Amended Summons for Confirmation sworn on 30/03/2017, he stated in para 4:

“The deceased died intestate and was survived by the following”

23. This phrase that the deceased died intestate is repeated several times in other documents in the record. As such, the respondent knew very well that the deceased died intestate until he decided to change his mind later for reasons known to him.

24. As for the statements of evidence allegedly used by the trial magistrate to support the existence of an oral will, it was argued that since the evidence was adduced to support an application for revocation of grant, which grant was revoked, it was a misdirection to use the said evidence in the hearing of the protest. My view is that the statements formed part of the record of this cause and as such may be used in evidence in subsequent proceedings. I find no misdirection on part of the magistrate on the use of the said evidence.

25. I reach a finding that the oral will as described by the respondent and his witnesses did not meet the requirements of Section 9 of the Act for lack of a date of its making. As such the trial magistrate misdirected himself when he made a finding that there was a valid oral will.

26. In the absence of a will the law applicable is Section 40 of the Act which in a polygamous household includes the surviving widow includes the surviving widow as an additional unit to the number of children. The appellant testified that her matrimonial home is on the disputed parcel of land LR. No. Baragwi/Raimu/912. This evidence that was not disputed by the respondent and as such it ought to have been considered in the decision of the case. It would inconvenience the appellant to vacate her matrimonial home to go and search for shelter elsewhere. Being the surviving widow, there is a great probability that she is older than the respondent.

27. **Section 40 (1) of the Law of Succession Act** deals with intestate succession where the intestate was polygamous.

“Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.”

28. In the case of **Francis Mwangi Thiong’o And 4 Others v Joseph Mwangi Thiongo (2015) eKLR** it was stated: -

“Section 40 aforesaid states that it is any wife surviving the deceased that would be considered as an additional unit in the number of children.....”

That ground of appeal therefore succeeds as the judge should have found that the first house had four units and the second comprising the respondents, had five units, the land should have been subdivided in the first instance along the ratio of 4:5.”

29. It was also contended by the appellant that the daughters of the deceased were left out of the distribution. None of the said daughters was a minor at the time this cause was filed and determined. I have perused the file and find that none of them came forward to claim interest in the estate. It is the appellant who has raised the issue on appeal I have perused her statement of evidence in support of her protest before the trial magistrate and it does not mention the daughters of the deceased as being interested in the estate. This leads me to the conclusion that they were not interested in inheritance of the estate though they are beneficiaries. However, the court will still consider them in the

distribution.

30. I have considered all the issues in this appeal. I find the appeal partly successful and make the following orders: -

- i. That the judgment of the learned trial magistrate is hereby set aside.*
- ii. That LR. Baragwi/Raimu/912 will be shared in equal shares between the surviving widow and the ten sons of the deceased.*
- iii. That the share of the appellant LR. Baragwi/Raimu/912 will as much as practically possible include her matrimonial home.*
- iv. That Plot No. 2 Rwambiti be inherited by the six (6) daughters of the deceased in equal shares.*
- v. That shares at Barclays Bank, Gichugu Housing and Ngariama Ranching Scheme be solely inherited by the appellant.*
- vi. That the parties meet their own costs of this cause.*

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Adoli for the Appellant

Ms. Kiai or Mwaura for Respondent