REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 106 OF 2014

CHRISTINA SIGILAI.....APPELLANT

-VERSUS-

MARSALINA BENJAMIN SIGILAI.....RESPONDENT

(Being an appeal from the Ruling of the Principal Magistrate

at Kapsabet in Kapsabet PM Succession Cause No. 58 of 2005

dated 7 August 2014 by Hon. B. Mosiria)

JUDGMENT

[1] This is an appeal from the decision of the Principal Magistrate at Kapsabet, dated **7 August 2014**, in **Kapsabet PM's Succession Cause No. 58 of 2005: Re The Estate of Benjamin Kipserem Sigilai**. That Cause had been filed jointly by the parties to this appeal, namely, **Christina Sigilai and Marselina Kepkinyor Sigilai**, who are the widows of the Deceased, **Benjamin Kipserem Sigilai.** The outcome was that **Monica Cherotich, Tecla Cherop** and **Joan Chepkasi,** who are said to be the daughters of the deceased with **Christina Sigilai,** and therefore beneficiaries of the deceased's estate, were excluded in the division of the estate.

[2] Being aggrieved by the decision of the Learned Principal Magistrate, the Appellant, **Christina Sigilai**, filed this appeal on **9 April 2015** on the following grounds:

> **[a]**`The Learned Principal Magistrate erred in law in distributing the estate of the deceased by locking out three other dependants of the estate, namely **Monica Cherotich, Tecla Cherop** and **Joan Chepkasi**, thus disinheriting them;
>
> **[b]** The Learned Principal Magistrate erred in law and on facts in holding that the Appellant did not prove in court that the three girls were the children of the deceased;
>
> **[c]** The Learned Principal Magistrate erred in law in shifting the burden of proof to the Petitioner, the maxim in law being that "He who alleges must prove";
>
> **[d]** The Learned Principal Magistrate failed to appreciate the provisions of the law as relates to the distribution of an estate to the heirs and/or dependants of a deceased person;
>
> **[e]** The Learned Principal Magistrate erred in law in holding that the tenets of Nandi Customary Law do not apply to the distribution of the estate of the deceased;
>
> **[f]** The Learned Principal Magistrate erred in law in failing to take into account the evidence before the court in its totality, thus occasioning a miscarriage of justice.

[3] Accordingly, the Appellant prayed that the appeal be allowed and that the Ruling of the Principal Magistrate be set aside; that an appropriate order be made for the fair distribution of the deceased's estate for the benefit of all the dependants based on Nandi Customary Law. In the alternative, the Appellant prayed that the matter be referred to another court for hearing *de novo*. She also prayed that the costs of the appeal and in the subordinate court be provided for. It is significant to note, at this point, that the Appellant has since died and was replaced herein by her son, **Mark Serem** pursuant to the Orders of the Court made herein on **18 July 2017.**

[4] The appeal was canvassed by way of written submissions which were filed herein on **29 January 2018** by Counsel for the Appellant, and on **5 February 2018** by Counsel for the Respondent. The submissions were thereafter highlighted on **29 May 2018** by **Ms. Tum** on behalf of the Appellant and **Mr. Choge**, Learned Counsel for the Respondent. I have given careful consideration to those submissions in the light of the lower court proceedings and Ruling. This being a first appeal, I appreciate that it is the duty of this Court to re-evaluate the evidence that was presented before the lower court and make its own conclusions thereon. Hence, I find instructive the expressions of **Sir Clement de Lestang, VP,** in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** that:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

[5] The key issue before the lower court was the question whether **Monica Cherotich, Tecla Cherop** and **Joan Chepkasi (hereinafter "the girls")** were indeed daughters of the Deceased so as to be entitled to a share of his estate; and here is how the Learned Trial Magistrate expressed herself on the issue:

> **"Christine Sigilai told the court that she had 4 children, 3 girls and one boy while Mersalina has 10 children 6 boys and 4 girls. Marsalina told the court that Christine got only one child who is the deceased's ... Marsalina doesn't agree that Christine had 3 girls but says the girls only used to stay with her for some time but later went back to their parents. Christine did not dispute that 3 girls are not with her but said that they had been married off. It is the contention of Marsalina (objector) that the 3 should not be considered in distribution of the estate and that the estate should be distributed among each dependant of deceased including the children. The Respondent did not have any prove to court to show the 3 girls were children of the deceased since the objector had objected to them being children of deceased...With no proof having been brought forth concerning the children of the deceased, the only explanation left is that the 3 girls were not children of deceased and are not entitled to his estate..."**

[6] Counsel for the Appellant relied on **Sections 26, 27 and 29** of the **Law of Succession Act** to support her submission that the three dependants in question qualify as beneficiaries of the late **Benjamin Kipserem Sigilai**; and that the court should therefore make reasonable provision for them by ordering a specific share to be given to them out of the net estate of the deceased. **Ms. Tum** therefore submitted that the Principal Magistrate erred in shifting the burden of proof to the Appellant and thereby arrived at an unfair and discriminatory decision by excluding the girls from inheriting their parent's estate. She cited **Article 27(3)** of **the Constitution**, which prohibits discriminatory treatment; as well as **Section 107** of the **Evidence Act, Chapter 80** of the **Laws of Kenya** and the case of **Naomi Wangechi Munene & Another vs. Dorcas Wanjiru Gitonga [2016] eKLR** for the proposition that whoever asserts a fact is under obligation to prove what he asserts in order to succeed.

[7] In his written submissions, **Mr. Choge** conceded that **Sections 27 and 28** of the **Law of Succession Act** do give the Court an unfettered discretion on to how the property of a deceased person is to be distributed, considering such factors as the nature and value of the deceased's property, the situation and circumstances, both present and future, of each of the deceased's dependants. According to **Mr. Choge**, only **Mark Kipchumba Serem** is recognized as a child in the 1st House (that is the house of **Christina Sigilai**) for purposes of **Section 3** of **the Law of Succession Act;** and that **Monica Cherotich, Tecla Cherop** and **Joan Chepkasi** are neither the biological children of the deceased, nor did the deceased take them in as his own children. Counsel argued that, having made those assertions, the burden of proof shifted to the Appellant, by dint of **Section 107** of the **Evidence Act**, to prove that the girls were indeed the deceased's children; which the Appellant failed to do. **Mr. Choge** thus urged the Court to find that the distribution was done in accordance with the law and cannot be faulted.

[8] Clearly therefore, the grounds of appeal can safely be collapsed into the following three:

> **[a]** Whether **Monica Cherotich, Tecla Cherop** and **Joan Chepkasi** were wrongly excluded in the distribution of the estate of the deceased;
>
> **[b]** Whether the distribution was done in accordance with the law;
>
> **[c]** The applicability of Nandi Customary Law.

[a] On Whether Monica Cherotich, Tecla Cherop and Joan Chepkasi were wrongly excluded in the distribution of the estate of the deceased;

[9] A careful perusal of the lower court record shows that the primary documents filed in support of the Petition for Letters of Administration Intestate by **Christina Sigilai** and **Marselina Sigilai** did not disclose the names of all the dependants of the deceased. In Form P&A.5 for instance, it was averred that the deceased died intestate and was survived by **Christina Sigilai** and **Marselina Sigalai**. The same information was contained in the Chief's letter dated **27 June 2005,** wherein it was proposed that the only property comprising the estate of the deceased, namely **Land Parcel No. Nandi/Chemuswa/651, measuring 14.15 Ha,** be shared equally by the two widows. Apparently, the names of the beneficiaries were set out for the first time in the schedule attached to the application for confirmation, dated **19 December 2008.** That list did not include the three disputed dependants; and this was the genesis of the disputation that precipitated the filing of this appeal; with the Appellant taking the position that **Monica Cherotich, Tecla Cherop** and **Joan Chepkasi** (hereinafter "the girls"), were unfairly left out in the distribution of the estate of the deceased.

[10] The question to pose then is, who would qualify as a dependant for purposes of succession? **Section 29** of the **Law of Succession Act** answers this question thus:

> **"For the purposes of this Part, "dependant" means-**

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

[10] The record of the lower court proceedings shows that the application for confirmation was heard and allowed on **23 March 2010**; and that, in the interim a series of applications and cross applications as well as a criminal case of trespass, were filed by the two Administrators against each other in connection with the distribution of the estate that culminated in the impugned Ruling. The record further shows that an order was made on **8 March 2011** for the adduction of *viva voce* evidence to enable the court make a determination on the place and rights of the three girls. Hearing commenced on **22 May 2012** and was concluded on **28 March 2013.**

[11] The Respondent testified on **22 May 2012** and affirmed that **Christina Sigilai**, got married to the deceased in **1961**, about 7 years before she (the Respondent) got married to the deceased. It was her evidence that the Appellant only had one child with the deceased, namely, **Mark Kipchumba Serem**. Her evidence was corroborated by the evidence of one of her sons, **Vincent Kipleting Ngetich**, who was similarly categorical that the Appellant's only child with the Deceased is **Mark Kipchumba Serem**. According to **Vincent Kipleting Ngetich**, both **Tecla** and **Joan** have their parents; and that **Tecla** is the daughter of **Arusei** while **Joan** is the daughter of **Sang**. He told the lower court that he did not know **Monica** at all.

[12] The Appellant had up to **28 March 2013** to respond to the allegations made by the Respondent and her son, **Vincent**, about the three girls. When her turn came, here is what she had to tell the court:

"...I know Benjamin Sigilai, he is my husband, he is deceased. I got married to him in 1961. We got married at Kaiboi. We did get 4 children.

1) Monica Cherotich

2) Tecla Cherop

3) Mark Serem

4) Joan Chepkasi

The children are all mine. Marsellina was lying all the 4 children are mine..."

[13] Whereas she thought it fit to avail and produce a photocopy of a letter from their priest to prove her marriage to the deceased; which fact was not in dispute, she was content to rely on the above stated evidence in connection with the crucial issue of the paternity of her the three girls, adding casually that:

"...the birth certificates are at home if am told to bring to court I will bring."

[14] In support of her evidence before the lower court, the Appellant called her nephew, **Joseph Chirchir** and her son, **Mark Serem**. In his evidence in chief, **Joseph Chirchir** told the lower court that the deceased sired 4 children with **Christine**. He however was unable to provide their names or years of birth. In fact, he conceded in cross-examination that he did not know the date of birth of the Appellant's first born. He was clearly hard-put to provide the names of his cousins. **Mark Serem** on his part asserted that **Monica Cherotich, Tecla Cherop** and **Joan Chepkasi** are his sisters, the eldest of them being **Monica**. He however contradicted the evidence of his mother the Appellant by stating that **Monica** was born in **1976**. (According to the Appellant, she gave birth to Monica in **1969**).

[15] In the light of the foregoing, the Trial Magistrate cannot be faulted for coming to the conclusion that the three girls were not children of deceased and are therefore not entitled to his estate. It is trite law that the burden of proof rests on the party whose case would fail if an alleged fact is not proved. **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** is explicit that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[16] Similarly, **Sections 109** and **112** of the **Evidence** ***Act*** *provide that:*

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

...

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

[17] It was therefore incumbent upon the Appellant to satisfy the lower Court that the three girls were indeed the offspring of the deceased, or that they were being maintained by the deceased immediately prior to his death. She in effect failed to rebut the evidence that was placed before the lower court by the Respondent and left the court with no option but to infer that the assertions of the Respondent were true. (see **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR).** Hence, the contention by **Ms. Tum** that the lower court shifted the burden of proof to the Appellant in contravention of the law is completely without foundation.

[b] Whether the distribution was done in accordance with the law;

[18] Section 40 of the **Law of Succession Act,** is explicit that:

> **(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the net intestate estate shall, in the first instance, be divided among the houses according to thenumber of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**
>
> **(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38."**

[19] Hence, having found, as it did, that the three girls were not dependants of the deceased, the lower court can hardly be faulted for the mode of distribution that it adopted. The court expressed itself thus in this regard:

> **"...In distributing the estate the court shall be guided by Part V of the Act...Unless the deceased had specified that his estate be distributed according to customary law which in this case he didn't the provisions of the [Law of] Succession Act thus prevail...S.40 of [the Law of] Succession Act provides that where there is more than one child, the distribution shall be according to the number of children in each house..."**

In the premises, it cannot be argued that the distribution was not done in accordance with the law.

[c] On the applicability of Nandi Customary Law.

[19] It was the submission of Counsel for the Appellant in the lower court that Nandi Customary Law was applicable to the Succession Cause. The Respondent on the other hand took the posturing that the applicable law is the **Law of Succession Act** by dint of **Section 4(1)(a)** and **Part V** thereof. Reliance was also placed on **Ogutu vs. Okumu [1986] KLR 780** for the proposition that the Courts are to be guided by african customary law in civil cases in which one or more of the parties is subject to or affected by it, so far as is applicable, provided that it is not repugnant to justice or inconsistent with any one written law; and, having taken all the relevant factors into account, the lower court came to the conclusion that:

> **"Unless the deceased had specified that his estate be distributed according to customary law which in this case he didn't the provisions of [the Law of] Succession Act thus prevail. The interest of justice will not allow the application of Nandi customary law in a case where there is a clear written law on it. And customary law can apply where parties have subjected themselves to it which is not the case herein..."**

[20] Having carefully perused the record of the lower court, there appears to be no specific evidence as to what aspects of Nandi Customary Law were applicable to the distribution as no evidence was led in this regard. In the same vein, and as the lower court correctly observed, there was no evidence that the deceased had made any will or preference on the applicability of Nandi Customary Law. Where such is the case, then the applicable law is undoubtedly the **Law of Succession Act**. It is instructive that **Section 2** of the Act provides that:

> **"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."**

[21] Needless to mention that the date of commencement of the Act was **1 July 1981;** or that the deceased died after that date. And so, in **Rono vs. Rono & Another [2005] eKLR,** the Court of Appeal held that:

> **"The application of customary law, whether Marakwet, Keiyo or otherwise, is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in Section 32 and 33 in respect of agricultural land and crops thereon or livestock where the law or custom applicable to the deceased's community or tribe should apply. But the application of the law or custom is only limited to "such areas as the Minister may by Notice in the Gazette specify." By Legal Notice No. 94/81, made on 23.06.1981, the Minister specified the various districts in which those provisions are not applicable. The list does not include Uasin Gishu district within which the deceased was domiciled. So that, the law applicable in distribution of the agricultural land in issue in this matter is also written law."**

In the premises, Nandi County not having been exempted from the application of the **Law of succession Act**, the Trial Magistrate was perfectly entitled to reach the conclusion she reached as to the applicability of Nandi Customary Law.

[22] In the result, it is my finding that the decision of the Principal Magistrate dated **7 August 2014**, in **Kapsabet PM's Succession Cause No. 58 of 2005: Re The Estate of Benjamin Kipserem Sigila** is sound in all respects and does not warrant any interference, bearing in mind

the words of **Sir Kenneth O'Connor** in **Peters vs. Sunday Post Limited [1958] EA 424** that:

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."**

[23] Accordingly, I find no merit in this appeal and would dismiss it. However, given the nature of the dispute, I would order that each party shall bear own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JULY 2018

OLGA SEWE

JUDGE