



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 4 OF 2016

(FORMERLY MERU CIVIL APPEAL NO. 116 OF 2008)

HARON IRERI M'ARACHI.....APPELLANT

VERSUS

JANET KAGUNA M'ARACHIRESPONDENT

(Being an appeal from the judgment of P.N. NGARE GESORA (SRM)Chuka Succession Cause No. 36 of 2002 delivered on 12th November, 2008).

JUDGMENT

1. M'Arachi Okabi died on 10th August, 1997 leaving behind two widows and several children. On 28th June, 2002, his widows Janet Kaguna M'Arachi and Tabitha Ciakarunguru, petitioned for letters of administration intestate vide Chuka SRM's Succession Cause No. 36 of 2002. In form No. P&A 5 they disclosed the estate to be comprised of only Karir gani/Mugirirwa /10 valued at Kshs.300,000/-. They also disclosed all the beneficiaries of the estate in that farm. On 22nd July, 2002, less than a month later, the grant was issued to them.

2. Pursuant thereto, on 27th February, 2007, Janet Kaguna M'Arachi decided to apply alone for the confirmation of that grant. In the said summons, not only did she exclude her co-wife, but she proposed that the estate be distributed equally to two sons of the deceased Eliphias Njeru M'Arachi and Patrick Muchungu M'Arachi. This was met with Protests from Haron Ireri M'Arachi and Gilbert Gitari whereby, she then proposed that the estate be distributed equally to all the beneficiaries at 0.51 Acres each.

3. The protest was fully heard whereby various witnesses testified whereupon the trial court distributed the estate as follows:-

a)Eliphias Njeru M'Arachi - 1 acre

b)Haron Ireri M'Arachi - 1 acre

c)Gilbert Gitari M'Arachi - 1 acre

d)Mwenda Mbiti - 0.5 acre

e)Njagi Mbiti - 0.5 acre

f)Janet Kaguna M'Arachi and The balance thereof to hold in trust for themselves

4. Aggrieved by that decision, Haron Ireri M'Arachi (hereinafter The Appellant") appealed to this court against the said decision. Setting out three (3) grounds of appeal. Before the appeal was heard, the Appellant filed an application under a certificate of urgency on 15th July, 2016 for leave to amend the Memorandum of Appeal. The court certified the same as urgent and was heard together with the main appeal on 11th July, 2016. The court reserved its ruling on that application for delivery together with judgment.

4. On the application, Mr. Mwanzia learned counsel for the Appellant submitted that the Memorandum of Appeal was filed by the Appellant in person. That it was necessary to amend the Memorandum and put a ground on a point of law, to wit, that the lower court had no jurisdiction to entertain the dispute. Counsel did not explain the delay in bringing the application, but submitted that the same is excusable under Article 159 (2) (d) of the Constitution of Kenya (hereinafter "the Constitution"). The application was opposed by the Respondent. Mr. Nyamu, learned counsel for the Respondent, submitted that the application was made in bad faith; that the matter has been pending since 2002 and by coming to court at such a late stage of the proceedings when the appeal was set to be heard amounted to an abuse of court process. That the parties had willingly submitted themselves to the jurisdiction of the trial court and a decision made in 2008. That the parties cannot be made to go back to the drawing board on a technicality which will be contrary to Article 159 (2) (d) of the Constitution., He urged the court to dismiss the application.

5. On the Appeal, it was submitted on behalf of the Appellant that the Respondent had expressly indicated the value of the estate in the documents she filed in court as being in excess of the Kshs.100,000/- allowed under section 48 of the Law of Succession Act, Cap 160, Laws of Kenya (hereinafter "the Act"). That on the authority the **Owners of Motor Vessel Lilian "S" .v. Caltex Oil Kenya Ltd [1981] KLR 1.**, the proceedings before the trial court were a nullity as it did not have jurisdiction. The Appellant thereupon abandoned all the other grounds. Mr. Nyamu relied on his detailed written submissions.

6. This court has considered the Affidavits on record and the written submissions of counsel. The Appellant sought leave to amend the Memorandum of Appeal on the ground that it was required in order to capture the pertinent issues in this appeal. This happened to be the issue of lack of jurisdiction on the part of the trial court. Although the Appellant made the application so late in the day, an issue of jurisdiction is so fundamental for a court of law to ignore. I do not think that there will be any prejudice to be suffered if the same is allowed. An order for costs in my view could compensate the Respondent in the circumstances. Accordingly, I allow the application and the memorandum annexed to the application is duly deemed as filed with leave of the court.

7. Having allowed the application, the only ground of appeal argued was that the lower court did not have the jurisdiction to entertain the cause. The Respondent had disclosed the value of the estate as being Kshs.300 000/-. The then section 48 of the Act provided inter alia, that:-

"48(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:-

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act."

As already indicated, the Respondent swore in form No. P&A. 5 that the value of the estate was Kshs.300.000/-. Mr. Nyamu's contestation that that might not have been the value of the estate as there was no valuation report cannot hold. In this court's view, a valuation report only becomes necessary when there is a dispute as to the value of the subject matter, In this ease, there was no such dispute. Mr.

Nyamu's own clients were in agreement and expressly informed the court through the Petition and the Affidavits filed, what they estimated the estate of the deceased to be valued at. That is a position I think the Respondent cannot rescile from. A party cannot be allowed in a same proceeding to take two opposing positions.

8. Mr. Nyamu submitted that the parties had willingly submitted to the jurisdiction of the trial court and that the Appellant cannot therefore be heard challenge the jurisdiction of that court. The answer to this is to be found in the Supreme Court decision. In the case of the **Interim Independent Electoral Commission [2011] eKLR** wherein the court held that the jurisdiction of a court emanates from the Constitution and/or statute. It cannot be assumed by a court or conferred by the parties. In this instance the Law of Succession Act denied the trial court jurisdiction. The documents were very express as to the value of the estate.

9. In the **Owners of Motor Vessel "Lilian S" .v. Caltex Oil Kenya Ltd (supra)** the Court of Appeal **[1989] KLR 1** stated at Pg 4:-

"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

This being the case, the decision of the trial court cannot stand. The appeal is therefore allowed and the judgment of the trial court is hereby set aside

10. In the circumstances, what orders should this court make? This court has seriously agonised over this matter on the appropriate orders to make. The deceased died in August, 1997, nineteen (19) years ago. The court saw the parties in court when the Appeal was argued. The Respondent was not only very old, but also agile and sickly because of advanced age. This is the injustice that our legal process, which is unfortunately painfully slow, subjects the litigants to. Many are those who do not live to see the sweet or bitter end of the disputes which they submit to our courts with a lot of hope. That hope is slowly turned into a painful waiting which leads to frustration, anguish and total despair. The hopelessness is usually written all over the faces of litigants by the time the trials begin or are concluded. It behoves our courts therefore to scrap through all our statutes and Constitution to ensure that justice is not delayed for whatever reason.

11. Section 78 of the Civil Procedure Act provides:-

"78(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-

a) to determine a case finally;

b) to remand a case;

c) to frame issues and refer them for trial;

d) to take additional evidence or to require the evidence to be taken;

e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein. (Emphasis mine).

12. As has already been observed, the deceased died nearly 20 years ago leaving behind his two widows and children. His first widow, who was a Co-petitioner before the trial court, died while these proceedings

were still pending. The parties have, litigated for the past fourteen (14) or so years, albeit before the wrong forum. Before that forum, all those who were interested in being heard presented their evidence by way of both Affidavits as well as oral testimony. After the judgment, the record shows that the Appellant tried to stay the execution thereof but he was unsuccessful before the High Court in Meru. As a result, the estate land was parcelled in terms of the trial court's judgment and new titles issued. This court was told that the beneficiaries have since settled and developed their respective portions.

13. At the hearing of the Appeal, in order to properly understand what the real dispute between the disputants was, this court exercised its powers under Section 78(1) (d) and received additional evidence from the two disputants herein, the Appellant and the Respondent. The Appellant testified on his own behalf while the Respondent, who looked old, frail and sickly asked the court to allow Eliphaz Njeru Rache to testify on her behalf. The latter was actually cross-examined by Mr. Mwanzia learned counsel for the Appellant.

14. Article 159 of the Constitution provides that in exercising the judicial authority conferred upon them, the courts shall be guided by, inter alia, the principles that justice should be done to all irrespective of status; that justice shall not be delayed and that justice shall be administered without undue regard to procedural technicalities. Already, there has been unreasonable delay in this matter leading to the demise of one of the widows of the deceased. The other widow, who is the Respondent in this Appeal is so old and frail. The parties have been in the court corridors for the last 20 years. The parties have placed before this court, through the Record of Appeal as well as the record of the lower court sufficient material from which the dispute between the parties can be determined with finality. It is the view of this court that on the basis of the record, there is no evidence that any of parties may have left out crucial that may be so or material that can be added now or in the future to change their respective cases. I hold this view because, the parties had placed before the lower court all their respective material for the determination of the dispute. Luckily, they were also granted an opportunity to do so by this court at the trial of the Appeal.

15. In view of the foregoing, the orders that commend themselves to this court under S78(1) (a) of the Civil Procedure Act are, that:-

a) the grant issued on 22nd July, 2007 be and is hereby revoked.

b) a fresh grant be and is hereby issued to Jane Kagana M'Arachi.

c) this court do proceed to determine the dispute on the basis of the material on record.

16. The cases of the respective parties are contained in the various Affidavits filed by them and the testimonies of witnesses both before the lower court and before this court. The Appellant's position is that he is one of the sons of the deceased; that in 1978, his brother Eliphaz Njeru took a loan on the security of the title for Karingani/Mugirirwa/10 and divided the proceeds therefrom with Patrick Muchunku and Alexander Mbiti. That the three (3) used the proceeds from the loan to purchase various properties for themselves. That when the property was advertised for sale in 1978, all failed to step forward to redeem it but left it all upon the Appellant to repay the loan and save the property. That the deceased had said that the Appellant and Gilbert Gitari benefit from the estate land. The Appellant admitted that he did not have any evidence to show how he repaid the loan.

When testifying before this court, he stated that only Eliphaz Njeru claimed a share in the estate in the lower court. He claimed the entire property for himself. PW2, Gilbert Gitari Makanga had testified that the deceased had decided during his lifetime that the estate be divided between his children only without involving outsiders. That the property should be distributed between him and the Appellant because all the others had their own land and were married.

17. On her part, the Respondent stated that she was the younger wife of the deceased. That her Co-wife had passed on after these proceedings had been filed; that she needed only three (3) acres for her house while the first house of her Co-wife should inherit 4 acres. That Ndigwa took a loan over the estate property but repaid the same. That the balance of the 0.89 Acres be used for roads. Patrick Muchunku

M'Arachi stated that the protestors were his step-brothers. That before his demise, the deceased had said that the estate land should be divided into two portions in favour of the two houses, for the widows to distribute to their respective children. That the money paid by the Appellant for the loan taken by Eliphaz Njeru was repaid to him by the latter. Before this court Eliphaz Njeru testified that he was a brother to the Appellant but he supported the proposed distribution by the Respondent as it was equitable. He set out the names of the children of his father's second house (the Respondent's, children). That the property had already been distributed with the first house getting 4 acres and the second house 3 acres and the property already distributed and titles issued. That there had been no favouritism in the distribution. In cross-examination, he stated, that he was employed by the union and the properties he owns were acquired through a loan from the Sacco. He told the court that the loan against the estate property was taken by the deceased but he helped the deceased in repaying the same. He produced a certified copy of the Green Card for Karingani/Mugirirwa/10 as PExh 1.

18. This court has considered the record, the testimonies of the parties as contained in the Affidavits as well as on record. There is no dispute as to who the beneficiaries of the deceased are and the asset of the estate. The question is how should the asset of the estate be distributed. Both the Constitution and the Act provide for the equality of all persons before the law. There is no male or female in matters of inheritance. **(See Rono v. Rono [2008] 1 KLR 803)**, and Article 27 of the Constitution.

19. From the record, the Respondent proposed to distribute to each of the thirteen (13) children of the deceased a share of 0.51 acres in the estate. She also proposed a similar share to a grandchild of the deceased. This was opposed by the Appellant and his Co-Protestor Gilbert Gitari. It turned out that the daughters of the deceased from the first house did not stake any claim on the estate. They neither filed any protests before the lower court nor did they appear at the appeal. According to the evidence on record the 1st house of the deceased had the following beneficiaries:-

- a)Justa Gaitu - daughter
- b)Eliphaz Njeru Ndwiga - son
- c)Virginia Ciamwari - daughter
- d)Alexander Mbiti (deceased but left Peter Mwenda Mbiti and Samwel Njagi Mbiti.)
- e)Mary Kanyuta - daughter
- 0 Harun Ireri M'Arachi - son
- g)Gilbert Gitari Makanga - son
- h)Nthiga M'Arachi son (pre-deceased) the deceased leaving no survivor).

20. On the other hand, the second house had five children, to wit:-

- a)Patrick Muchunku - son
- b)Jane Makanga - daughter
- c)Jenniffer Makanga - daughter
- d)Muthoni Makanga - daughter
- e) Prisca Makanga - daughter

From the testimonies of the Respondent and her son, Patrick Muchunku, the daughters from the second house do not seem to have renounced any of their interests. That is why they proposed that the two be

registered as owners of the three (3) acres in the estate to hold for themselves and on behalf of the said daughters.

21. The Appellant contended that since his brother Eliphaz Njeru and two of his brothers had purchased other lands using a loan secured by the estate land, and that since he, the Appellant is the one who repaid the same, the estate land should be distributed to him and Gilbert Gitari. Firstly, there was no evidence that the loan of Kshs.11,000/- obtained and secured against the estate land in 1974 was obtained by or benefited Eliphaz Njeru, Alexander Mbiti and Patrick Muchunku as alleged. Secondly, there was no evidence that the properties any of the said beneficiaries owned was obtained through the proceeds from the said loan. Finally, the Appellant did not produce any credible evidence to show that he is the one who repaid the said loan and/or redeemed the said property. Even if that was the case, if that was the intention of the deceased, he would have formally bequeathed the entire property to the Appellant or the Appellant and Gilbert Gitari as they contended. This he never did during his lifetime. It turned out that Eliphaz Njeru who does not seem to be in good terms with the Appellant used to work for some union in Chuka and obtained Sacco loans from which he purchased his own properties. His contention that he assisted the deceased to repay the loan taken on the estate property was neither denied nor challenged.

22. It would seem that the contention by the Appellant that the estate property be divided between him and Gilbert Gitari is premised on the fact that all his other brothers are well off and have their own lands. That on the other hand, he and his said brother, Gilbert Gitari have none and that he has children. To this court's mind, the fact that a beneficiary has acquired his/her own properties separate from the estate and is well off does not in itself bar him/her from participating in the distribution of an estate to which he is a beneficiary. If it is proved that the other property owned by such a beneficiary was obtained from the deceased, what the court has to do is to take it into consideration while undertaking distribution. In this case, there is no evidence to show that the deceased had bequeathed the estate land to the Appellant and Gilbert. The Evidence shows that the deceased divided the land into two with a view to settle the two houses on the separate portion. That being the case, it cannot be that he intended the same to be for only two of his children. There is no evidence that the deceased had distributed his property while he was alive.

23. In view of the foregoing, how should the property be distributed? Under section 40 of the Act, each child of the deceased constitutes a unit. The distribution is not based on houses as the parties suggested. The daughters of the first house are shown not to have any interest with the estate. Not so for the second house. The units for the first house therefore amount to four (4) while those of the second house are six (6) including the widow. The title shows that the property measures approximately 7.89 acres. This court's view is that the 0.89 acres set aside for roads is too big. The court also notes that the Respondent had proposed that her house gets a smaller portion as opposed to the first house.

24. In this regard, considering the personal circumstances of the beneficiaries, the estate is distributed as follows:-

(a) First house

- | | | |
|---------------------------|---|------------|
| i.Eliphaz Njeru Ndwiga | - | 1 acre |
| ii.Gilbert Gitari Makanga | - | 1.2 acres; |
| iii . Peter Mwenda Mbiti | - | 0.5 acre |
| iv.Samuel Njagi Mbiti | - | 0.5 acre |
| v.Haron Ireri M'Arachi | - | 1.3 acres |

(b) Second house

- i. Jane Kaguna M'Arachi

ii. Patrick Muchunku M'Arachi

iii. Jane Makanga

3 Acres equally

iv. Jenniffer Makanga

v. Muthoni Makanga

vi. Prisca Makanga

The balance of 0.49 acres is left for the roads as suggested by the administrator.

It is decreed accordingly.

DATED and Delivered at Chuka this 15th September, 2016.

A.MABEYA

JUDGE