REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 257 OF 2013

(Formerly Embu H.C.C.A. 102 of 2010)

ROSE KUTHII WERU…..……..…….APPELLANT

-VERSUS-

MERCY KOINA…….....…….…….....RESPONDENT

(An appeal from the judgment of the Principal Magistrate's

Court (Ndungu H.N.) at Kerugoya, Succession Cause No. 146 of 1994

dated 20th September, 2010)

JUDGMENT

1. This is an appeal by **ROSE KUTHII WERU** (hereinafter to be referred to as appellant) which arose from the judgment of the lower court (Kerugoya Principal Magistrate's Court Succession Cause No. 146 of 1994) delivered on 20th September, 2010. The cause in the lower court involved the estate of the late **Ndwiga Njagi** who died intestate on the 14th June, 1971. The Petition for letters of administration was first presented by the late **KORI NDWIGA** who was the only surviving widow, the other widow Ruguru Ndwiga is said to have passed on in 1955 while the third one Wamuranga Ndwiga was contested or disputed by the Respondent herein, **MERCY KOINA** – a daughter to the deceased.
2. The record from the court below shows that the Petitioner died in 1995 before the cause was determined and an application for substitution was brought by MOSES WERU who later died and was substituted by the sister – MERCY KOINA, the respondent who was appointed together with Rose Kuthii Weru – as administratrixes of the estate. Mercy Koina later filed a protest in the same court to the appellant's proposed mode of distribution of the estate of the deceased that comprised that property known as L.R. NGARIAMA/THIRIKWA/134 measuring approximately 8.5 acres. The protest was heard by the lower court by way of oral evidence and the trial court below decided in favour of the protestor finding that the estate should be distributed to Frederick Njagi, Waweru Ndwiga and Mercy Koina only as the appellant had already benefitted from a share in **L.R. NGARIAMA/LOWER NGARIMA/322** (measuring 25 acres or thereabout) which had been given to her husband, the late Moses Weru as gift *intervivos* by the deceased in the cause.
3. The Appellant was aggrieved by the above decision and filed this appeal on the following grounds namely:

i. ***That the learned magistrate erred in law and fact in proceeding to confirm the grant as proposed by the protestor when it was clear that the deceased died in the year 1971 and that a miscarriage***

of justice was occasioned.

ii. ***That the learned Senior Resident Magistrate erred in law and fact when writing the judgment without notice to the appellant who then failed to file submissions resulting in miscarriage of justice (sic).***

(iii) That the learned magistrate erred in law and fact by Failing to analyse evidence adduced by all the parties, the documentary evidence and the law applicable and by so doing occasioned miscarriage of justice.

(iv) That the learned magistrate erred in law and fact by Adopting the evidence of a hostile witness without warning himself of the danger.

(v) That the learned magistrate erred by not giving reasons for his judgment.

4. In her written submissions the Appellant maintained that Ndwiga Njagi the deceased herein was polygamous and was married to three (3) wives. She further submitted that the only property comprising the estate is that property known as **NGARIAMA/THIRIKWA/134** and that land parcel No. **NGARIAMA/LOWER NGARIAMA/322** did not form part of the estate as the same was the property of her husband the late Moses Weru who was the first registered owner.
5. According to the Appellant, the deceased herein was married to three (3) wives and therefore his family comprised three (3) houses as follows:

1. First house/1st wife – Wamurang'a Ndwiga Njagi (deceased)

   Children: 1. Muchira Ndwiga (deceased)

   2. Mutitu Muturi (daughter)

   3. Muthoni Ndwiga (daughter)

2. 2nd house/2nd wife – Karugi Ndwiga (deceased)

   Children: 1. Frederick Njagi Ndwiga (son)

   2. Saveria Muringo Ngari (daughter)

   3. Frank Waweru Ndwiga (son)

3. 3rd house/wife – Kori Ndwiga (deceased)

   Children: 1. Moses Weru (deceased) and

   husband to the appellant Rose Kuthii Weru.

   2. Mercy Njoki – (daughter)

6. On the basis of the above, the Appellant had proposed that the property comprising the estate that is NGARIAMA/THIRIKWA/134 be distributed equally among the 3 houses. He faulted the trial court for not analyzing the evidence tendered by the witnesses. In her view, the Respondent conceded at the trial court that MOSES WERU was given **NGARIAMA/LOWER NGARIAMA/322** by Umbui clan and that he was a first registered owner. She submitted that the property did not form part of the estate and was not a gift from the deceased herein.
7. The Appellant further submitted that she had been in occupation of the estate comprised in land parcel No. NGARIAMA/THIRIKWA/134 and that the trial court erred by finding that the

Appellant could not have been occupying buildings that were in a dilapidated state. She argued that she was once stopped by the same court from further construction.

8. On the number of houses or wives that the deceased had married, the Appellant faulted the trial learned magistrate by giving weight to the evidence of a witness who had been declared hostile without warning herself on the danger of relying on the same. She submitted that the deceased was married to three wives and in view of the fact that the deceased died before the commencement of **Law of Succession Act (Cap 160)** the applicable law is Kikuyu customary law which provides that the estate should be divided equally among the three houses.
9. Finally Mr. Ngigi, learned counsel for the Appellant, in his oral submission asked this Court to re-evaluate the evidence tendered at the trial and consider a retrial if I was to find certain issues unclear. He reiterated that the property known as **LOWER NGARIAMA/322** was not a trust land but a first registration property belonging to the Appellant's late husband and in that context he contended that the quoted authority in the case of **KARANJA KARIUKI –VS- KARIUKI [1983] KLR** could not apply. He further submitted that if the Respondent's claim on the said property was based on trust then she can pursue her claim in an Environment and Land Court.
10. The Respondent opposed the appeal and supported the decision of the learned trial magistrate. She submitted through written and oral submissions by learned counsel Mrs. Kingori Advocate that the deceased was married to only 2 wives and that the Appellant's late husband had been catered for by the deceased through a gift given to him *intervivos*.
11. The Respondent's contention is that the evidence tendered at the trial court demonstrated that the late Ndwiga Njagi, the deceased herein having given the Appellant's late husband **LOWER NGARIAMA/322** which measures about 25 acres, he had left **NGARIAMA/THIRIKWA/134** measuring about 8.5 acres to be shared among the other younger siblings and drew this Court's attention to the fact that their late mother, Ann Kori had attempted to do just that before she died.
12. She submitted that the witnesses called by the Appellant at the trial did not weaken the Respondent's position submitting that the Appellant's witness who was declared hostile was not hostile but was telling the truth. She countered that the learned trial magistrate analysed the entire evidence well before deciding in Respondent's favour.
13. On the ground of lack of judgment notice, the Respondent submitted that all the parties were duly notified to file their submissions at the conclusion of hearing and the fact that the judgment was not delivered on the due date for sufficient reasons could be a good basis of this appeal.
14. The Respondent further countered the Appellant's contention that the learned trial magistrate adopted the evidence of a hostile witness by submitting that the evidence of the said witness was duly subjected to cross-examination at the trial and the witness was not discredited but corroborated the Respondent's witnesses.
15. On the Appellant's contention that the trial magistrate failed to give reasons for his decision, the Respondent defended the trial court submitting that the learned trial magistrate analysed the evidence well and directed himself properly on the conclusions he made.
16. On the ground that the learned magistrate erred by confirming the grant as proposed by the Respondent when the deceased died before commencement of **Law of Succession Act**, the Respondent submitted that the ground lacked basis and quoted ***Section 2 (2)*** of the Act which provides that the estates of persons dying before commencement of the Act are subject to written laws and customs applying at the date of death but the administration of the estate shall be in accordance with the Act. She submitted that the substantive law applicable in the estate of the deceased person was **Law of Succession Act** under which the proceedings were instituted. In her view the learned trial magistrate correctly applied the law and the customs of the deceased person in confirming the grant.
17. The Respondent further submitted quoting a case book on "law of succession" by Hon. W. M. Musyoka that supported the view that a father was allowed at customary law to distribute the bulk of his estate during his lifetime. He supported this position with the authority from the case of **KARANJA KARIUKI -VS- KARIUKI [1983] eKLR** and the views of Eugene Cotran the author of a publication known as *"The Study Restatement of African Law Kenya 2, The Law of Succession"*.
18. It is in the above context that the Respondent submitted that the deceased gifted his first born son, the late Moses Weru **NGARIAMA/LOWER NGARIAMA/322** during his lifetime which she

argued explains why the Appellant had been occupying the parcel of land. She further submitted that the other children respected their father's wish which is why they staked claim on **NGARIAMA/THIRIKWA/134** and supported the learned trial magistrate for appreciating the facts presented before the trial court adding that the late Moses Weru or the appellant cannot claim the estate herein as that would be unfair as she would benefit twice after benefiting from the gift comprised in **NGARIMA/LOWER NGARIAMA/322**.

19. This Court has considered this appeal, the written and oral submissions made in support of the appeal. The Court has also considered the rival submissions made in opposition to the appeal and in support of the decision of the trial court. This appeal has raised the following main issues for determination by this Court.

1. Whether land parcel No. NGARIAMA/LOWER NGARIAMA/322 was a gift given to the first born son the late Moses Weru during the lifetime of the deceased herein.
2. Whether the trial court applied the correct law in determining the cause or in distribution of the estate.
3. Who are legally entitled to benefit from the estate of Ndwiga Njagi.

20. Before addressing the above issues I will address some of the grounds raised in the appeal which may not directly touch on the issues highlighted above.

To begin with the 2nd ground of appeal, the Appellant contended that the learned trial magistrate erred by not giving notice of judgment as a result of which she was unable to file her submissions for consideration by the trial court before it made its decision. I have looked at the proceedings of the trial court which clearly shows that the learned trial magistrate on 4th June, 2010 at the conclusion of the trial, gave both parties more than 60 days to file their submissions which was to be filed by 10th August same year. The Appellant cannot fault the trial court for her indolence for not filing her submissions on time or at all and in any event this Court finds that the said ground in itself incompetent as such a ground can only be raised in an application for review or setting aside of a judgment but certainly cannot be ground for appeal because what underpins the Appellant's contention is that she was unable to present her case in its entirety to the trial court before judgment was delivered. On that basis, this Court finds that ground two of the appeal does not hold any water in this appeal.

21. On ground 4 of the appeal, the Appellant's contention that the learned trial court erred by adopting the evidence of a hostile witness without warning himself of the danger was countered by the Respondent's argument that the trial court did not adopt the evidence of the said witness, D.W. 4 Gibson Gachoki as such but considered the evidence adduced. I find that the Appellant successfully applied for the said witness to be declared hostile to enable Appellant's counsel subject the evidence to cross-examination to test its credibility. It is important to note that a mere fact that a witness is declared hostile in court does not mean that the evidence of the witness is rendered inadmissible. The learned trial magistrate was entitled to make the finding which he did based on the facts presented and the demeanor of the witness as he appeared before him. This Court agrees with the Respondent's submissions that the trial court was correct to observe that the said witness did not support the Appellant's case because he disagreed with its truthfulness.

22. **Whether the learned trial magistrate correctly applied the applicable law in distribution of the estate of the deceased.**

The deceased in the cause subject of this appeal died in 1971 before the commencement of the **Law of Succession Act** (1st July, 1981). The deceased person was a Kikuyu by tribe and therefore as per ***Section 2 (2)*** of the **Law of Succession Act** the applicable law in so far as it was not repugnant to justice or inconsistent with any written law was Kikuyu customary practices. The administration of the estate however was to be in accordance with the Act. This position of law has been evident in various decisions of this Court and the Court of Appeal. In the case of **PHILIS MICHERE MUCEMBI -VS- WAMAI MUCHEMBI [2010] eKLR** the deceased had died before the commencement of the **Law of Succession Act (Cap. 160).** The court made the following observations:

"Section 2(2) of the Law of succession Act clearly excludes the distribution of the estate of a person who died before 1st July, 1981. Such property must be distributed in accordance to the law of succession that was in place before the Law of Succession was enacted. On this point I am persuaded by the decision of my late brother Kamau Ag. J. in HCC Succession Cause No. 935 of 2003 (in the matter of the estate of Mwaura Mutungi alias Mwaura Gichigo Mbura (dcd) where he said that where the deceased died prior to the commencement of the Law of Succession Act the distribution of his estate is strictly governed by the applicable customary law, however the provisions of the law of succession act as provided under Section 2 (2) of Cap. 160 govern the administration of the said estate."

Lady Justice Rawal was of the same view in **Nairobi High Court Civil Suit No. 2487 of 1996.**

23. The trial magistrate in this instance found that the deceased herein was polygamous and married to two wives contrary to assertions made by the Appellant. Based on the facts presented before the trial court, I do find that the learned trial magistrate was correct in that regard. The Appellant did not place any material or call any witnesses to establish that the deceased was indeed married to one Wamurang'a Ndwiga Njagi the supposed first wife. There was no child or relative from the said Wamurang'a who was called to testify. In fact the Appellant testified before the trial court that she had no knowledge of the whereabouts of the children of the supposed Wamuranga. It is therefore clear from the evidence tendered that the deceased was married to only two wives Karugi Ndwiga (deceased) and Kori Ndwiga (also deceased). The distribution adopted by the trial court cannot be faulted on ground of customary law practice or that was repugnant to justice or morality or that it was inconsistent with any written law. I do find that one of the beneficiaries Saveria Muringo told the trial court that she was married and not interested in the estate of the deceased. The Respondent's mode of distribution catered for all the children of the deceased save for the Appellant in view of the issue which I will now address.
24. **Whether land parcel No.** NGARIAMA/LOWER NGARIAMA/322 **was a gift to the Appellant's husband given to him during the deceased's lifetime and if so if he could still be entitled to another share in NGARIAMA/THIRIKWA/134.**

The Appellant claimed that lower Ngariama was given to her late husband by Umbui clan, which the deceased belonged to and that the property was not a gift given as a gift during the lifetime of the deceased as maintained by the Respondent. I have looked and re-evaluated the evidence tendered. I have in particular considered the evidence of P.W.5, **(Moses Waweru Njiru)** and D.W.4 **(Gibson Gacoki Nyaga)** at the trial court and considering that the standard of proof required is on a balance of probabilities, I find that the trial magistrate cannot be faulted in the conclusion he made that the late Moses Weru was given **NGARIAMA/LOWER NGARIAMA/322** by Umbui clan courtesy of the blessings of his father – the deceased herein. The question one must ask himself or herself is if the late Moses Weru was not a first born son to Ndwiga Njagi, could he have benefitted from an allotment of 23 acres of land from Umbui clan? The answer in my considered view is in the negative and I find that the issue of first registration did not alter the fact that the Appellant's husband benefitted from a gift given to him *intervivos* by his father as a first born son. This Court takes judicial notice of the practice at the time which was not unusual for a father to influence for his first born son if an adult to be considered for allotment. Furthermore, I do find that there was evidence adduced that both the Appellant's husband and the Respondent shared the same mother – Kori Ndwiga (deceased) who had during her lifetime attempted to distribute the estate comprised in **NGARIAMA/THIRIKWA/134** to her children excluding the Appellant's late husband for the same reason given by the Respondent and six other witnesses at the trial court which is the fact that the Appellant's late husband had already benefitted from **NGARIAMA/LOWER NGARIAMA/322** could not again stake claim in **NGARIAMA/THIRIKWA/134** the property forming the estate. The Appellant did not adduce evidence to suggest or even alleged that the mother in law was favouring her late husband's siblings. From the evidence on record I find that the learned trial magistrate was correct to find as he did that the property known as **NGARIAMA/LOWER NGARIMA/322** though registered in the names of the Appellant was a gift given to him by the deceased *intervivos*. In this respect I

agree with the decision quoted by the Respondent in the case of **KARANJA KARIUKI –VS-KARIUKI [1983] eKLR** where Kneller JJA (as he then was) in illustrating the practice under Kikuyu customary law observed as follows:

> ***"Now by custom a Kikuyu father has to distribute his land among his heirs during his lifetime if possible and usually does so. This often happens where a son marries and it counts as that son's share if his father does not revoke the gift before he dies."***

This Court finds that the evidence adduced in totality and the circumstances obtaining at the time supported the finding made by the trial court. This Court finds that the finding of fact is well founded and justice demands non-interference of the same.

25. The provisions of ***Section 42*** of the **Law of Succession Act** provides as follows:

> ***"Where an intestate has during his lifetime or by will paid, given or settled any property to or for the benefit of a child,……that property shall be taken into account in determining the share of the net intestate finally accruing to the child……."***

The above being the position in law, I find that the Appellant's husband having benefitted from about 25 acres of land, cannot again stake claim in approximately 8.5 acres in **NGARIMA/THIRIKWA/134** as doing so will be detrimental to the interests of the other siblings left behind by the deceased. The Appellant was therefore not entitled to a share in the said property comprising the estate and the trial court was correct in the mode of distribution adopted which for me was fair and just.

In the foregoing, I find no merit in this appeal. The same is disallowed with costs to the Respondent.

Dated and delivered at Kerugoya this 1st day of October, 2015.

R. K. LIMO

JUDGE

1.10.15

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Rose Kuthii appellant present

Ngigi for appellant

Mercy Koina Kinyori acting for

COURT: Judgment dated, signed and delivered in the open court in the presence of Rose Kuthii Weru and Mercy Koina and in the presence of Ngigi and Kinyori advocate.

R. K. LIMO

JUDGE

1.10.15